*TOGETHER WITH NO. 240, VARNEY V. SAME NO. 241, SMITH ET AL. V. SAME, AND NO.242, RUTHERFORD V. SAME

CARD 1

Pat 136 6586 SB

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1930

No. 239

ALVIS MAYNARD, ADMINISTRATOR OF MARY A. RONAN, DECEASED, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY

No. 240

JOHN B. VARNEY, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY

No. 241

J. M. SMITH AND A. B. SCOTT, PETITIONERS,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY

No. 242

A. G. RUTHERFORD, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED JUNE 30, 1930

CERTIORARI GRANTED OCTOBER 13, 1930

(35,161, 35,162, 35,163, 35,164)

(35,161, 35,162, 35,163, 35,164)

SUPREME COURT OF THE UNITED STATES

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vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY

No. 240

JOHN B. VARNEY, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY

No. 241

J. M. SMITH AND A. B. SCOTT, PETITIONERS,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY

No. 242

A. G. RUTHERFORD, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

In Bankruptcy

In the Matter of Pricy A. Varney, Bankrupt

In the Matter of Nancy Jane Varney, Bankrupt

Order on Petition for Review of Claim of Alvis Maynard, Administrator of Mary A. Ronan, Deceased—Filed June 4, 1929

The petition for review of the order of Honorable B. O. Becker, Referee, entered December 17, 1927, coming on to be heard, and the court being advised, it is ordered that said petition for review be sustained; that the order of the Referee be set aside, the claim allowed, and this proceeding remanded to the Referee for further proceedings consistent herewith.

A. M. J. Cochran, Judge.

[fol. 2] In United States District Court

Order Allowing Appeal, Claim of Alvis Maynard, Administrator of Mary A. Ronan, Deceased—Filed June 4, 1929

The petition for appeal of W. K. Elliott, Trustee in Bankruptcy of Pricy A. Varney and Nancy Jane Varney, and the assignment of errors is ordered filed, and said appeal is allowed upon execution of bond by trustee in the sum of $200.00. Thereupon, the Trustee presented his bond, with Stanley Reed as surety, which bond is approved.

A. M. J. Cochran, Judge.

IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, CLAIM OF ALVIS MAYNARD, ADMINISTRATOR OF MARY A. RONAN—Filed June 4, 1929

To the Honorable A. M. J. Cochran, Judge United States District Court for the Eastern District of Kentucky:

Your petitioner, W. K. Elliott, Trustee in Bankruptcy of Pricy A. Varney and Nancy Jane Varney, conceiving himself aggrieved by the certain order entered herein on the 4 day of June, 1929, in the above entitled proceedings, setting aside the order of the Referee, entered December 17, 1927, expunging the claim of Alvis Maynard, Administrator of Mary A. Ronan, deceased, for $3,150.00, and directing that this claim be allowed, does hereby petition for an appeal from the said order of the United States District Court for the Eastern District of Kentucky, the United States Circuit Court of Appeals for the Sixth Circuit, and prays that his appeal may be allowed, and that a citation may be granted, directed to said Alvis Maynard, Administrator of Mary A. Ronan, commanding him to appear before the [fol. 3] United States Circuit Court of Appeals for the Sixth Circuit to hear and receive that which may pertain to justice to be done in the premises; that a transcript of the record in said proceedings, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Sixth Circuit.

W. K. Elliott, Trustee in Bankruptcy of Pricy A. Varney and Nancy Jane Varney, by Browning & Reed, Stratton & Stephenson, His Solicitors.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS, ALVIS MAYNARD, ADMINISTRATOR, ETC.—Filed June 4, 1929

Now comes W. K. Elliott, Trustee in Bankruptcy of Pricy A. Varney and Nancy Jane Varney, and files this his assignments of errors, complaining as follows:

(1) That the order of the District Court allowing the claim of Alvis Maynard, Administrator of Mary A. Ronan,

was contrary to law in that it was based upon a ruling that it was inequitable to decree the expunction of said claim.

(2) In that it permitted the claimant to make proof of claim on a liability of the bankrupt which was not a fixed liability as evidenced by judgment or instrument in writing absolutely owing at the time of the filing of the petition in bankruptcy.

(3) In that the endorsement of the bankrupts on a negotiable instrument not due at the date of the bankruptcy was allowed as a claim against the bankrupt estates.

(4) In that it was, in effect, held that an objection or petition to expunge might not be filed against a claim at any [fol. 4] time during the pendency of the bankruptcy proceedings.

(5) In that it was, in effect, held that the Trustee had been guilty of laches in not filing his petition to expunge and objection at an earlier date.

Stratton & Stephenson, Browning & Reed, Solicitors for Petitioner.

Bond on appeal for $200.00, approved and filed June 4, 1929, omitted in printing.

[fol. 5] IN UNITED STATES DISTRICT COURT

STIPULATION RE APPEAL—Filed June 4, 1929

It is hereby stipulated and agreed that compliance with Equity Rule 75, and each and every part thereof, is hereby waived on the appeal of W. K. Elliott, Trustee in Bankruptcy of Pricy A. Varney and Nancy Jane Varney, appellant, and Alvis Maynard, Administrator of Mary A. Ronan, deceased; that neither party thereto shall be required to file a præcipe; that notice of intention to file petition for appeal is waived.

Pursuant to Equity Rule 77, and with the approval of the Honorable A. M. J. Cochran, Judge of the United States District Court for the Eastern District of Kentucky, it

is further stipulated that the following agreed statement of record on appeal, when filed in the office of the Clerk of the District Court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree, and such statement shall be copied and certified to the Appellate Court as the record on appeal.

IN UNITED STATES DISTRICT COURT

AGREED STATEMENT OF RECORD ON APPEAL

(1) Pricy A. Varney and Nancy Jane Varney were adjudged bankrupts on their voluntary petition, in the United States District Court for the Eastern District of Kentucky, on the 3rd day of August, 1925, and their cases referred to the Honorable B. O. Becker, one of the referees, before whom both proceedings are now pending. Thereafter, on August 18, 1925, W. K. Elliott, Esquire, appellant herein, was appointed, qualified and is now acting as trustee of each estate.

(2) On August 18, 1925, appellee's decedent, Mary A. Ronan, filed a claim against the estates of each of the bankrupts based on a note, copy of which follows:

[fol. 6] "$3000.00. Williamson, W. Va., Oct. 3, 1924.

One year after date I promise to pay to the order of W. P. T. Varney Three Thousand Dollars, Value received, negotiable and payable at The Day and Night Bank, Williamson, W. Va.

Int. 6%. Fred H. Varney.

Endorsement on back: Nancy Jane Varney, Pricy A. Varney, W. P. T. Varney.

An order was that day entered al-owing the claim for the full amount in each bankruptcy.

(3) On February —, 1926, a dividend of ten per cent was declared and paid on the claim allowed against Pricy A. Varney's estate; this dividend was paid from the income of the estate. No property of this estate or of Nancy Jane Varney's estate has been sold.

(4) On July 25, 1927, the Trustee filed a petition to re-examine and expunge these claims in both estates, alleging that in the admisistration of the estates of these bankrupts, the trustee, on October 17, 1925, filed a petition to re-examine and expunge the claim of the First National Bank of Pikeville, predicated on three notes endorsed by the bankrupts, none of which were due at the adjudication. One of the grounds of objection was that the notes were not provable under Section 63A, because not obsolutely owing at the date of the adjudication. The Referee denied the prayer of the Trustee's petition on January 26, 1926. The District Court granted the prayer of the petition and sustained the exception of the Trustee, on May 26, 1926, on the ground of non protest of one, and that two of said notes fell due more than one year from the date of the adjudication, and the action of the District Court was affirmed by this court on May 13, 1927, on the ground that none of said notes were provable under Section 63-A 4 of the Bankruptcy Act, the case being First National Bank v. Elliott, 19 F. (2) 426. The right of review expired June 12, 1927.

The petitions further alleged that each of these bankrupts were endorsers on said note; that on August 3, 1925, the date of adjudication in bankruptcy in both estates, the note was not due; that at the time of said adjudication said [fol. 7] note was not a fixed liability absolutely owing at the time of the filing of the petition in bankruptcy, and was not then payable.

(5) Answers were filed by the claimant pleading (a) laches in the trustee; (b) Provability of the claim under Section 63-A of the Bankruptcy Act.

(6) The referee sustained the petition to re-examine the claims and expunged them.

(7) The petition for review was duly taken to the District Court, and that court set aside the order of the Referee and directed the allowance of the claim on 4 day of June, 1929.

(8) Pending the proceedings, the claimant, Mary A. Ronan died, and by proper orders, the proceeding was revived in the name of Alvis Maynard, Administrator of Mary A. Ronan.

(9) It was agreed that the two petitions for re-examination and to expunge might be heard together on the same record.

Agreed.

Stratton & Stephenson, Browning & Reed, Solicitors for Appellant, W. W. Elliott, Trustee in Bankruptcy of Pricy A. Varney and Nancy Varney. Randolph Bias, Solicitors for Alvis Maynard, Administrator of Mary A. Ronan.

Approved. A. M. J. Cochran, District Judge.

[fol. 8] Citation, in usual form, showing service on Randolph Bias, omitted in printing.

[fols. 9 & 10] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 11] In United States District Court, Eastern District of Kentucky

In Bankruptcy

In the Matter of Pricy A. Varney, Bankrupt

In the Matter of Nancy Jane Varney, Bankrupt

Order on Petition for Review of Claim of John B. Varney—Filed June 4, 1929

The petition for review of the order of Honorable B. O. Becker, Referee, entered December 17, 1927, coming on to be heard, and the Court being advised, it is ordered that said Petition for Review be sustained; that the order of the Referee be set aside; the claim allowed, and this proceeding be remanded to the Referee for further proceedings consistent herewith.

A. M. J. Cochran, Judge.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed June 4, 1929

The petition for appeal of W. K. Elliott, Trustee in Bankruptcy of Pricy A. Varney and Nancy Jane Varney, and the assignment of errors, is ordered filed, and said appeal is allowed on the execution of a bond by the Trustee, in the sum of $200.00.

Thereupon the Trustee presented his bond, with Stanley Reed as surety, which bond is approved.

A. M. J. Cochran, Judge.

[fol. 12] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT

To the Honorable A. M. J. Cochran, judge of the United States District Court for the Eastern District of Kentucky:

Your petitioner, W. K. Elliott, Trustee in Bankruptcy of Pricy A. Varney and Nancy Jane Varney, conceiving himself aggrieved by the certain order entered herein on the 4 day of June, 1929, in the above entitled proceedings, setting aside the order of the Referee entered December 17, 1927, expunging the claim of John B. Varney for $3,000.00, and directing that this claim be allowed, does hereby petition for an appeal from the said order of the District Court for the Eastern District of Kentucky, to the United States Circuit Court of Appeals for the Sixth Circuit, and prays that his appeal may be allowed, and that a citation may be granted, directed to said John B. Varney, commanding him to appear before the United States Circuit Court of Appeals for the Sixth Circuit, to hear and receive that which may pertain to justice to be done in the premises; that a transcript of the record and evidence in said proceedings, duly authenticated may be transmitted to the United States Circuit Court of Appeals for the Sixth Circuit.

W. K. Elliott, Trustee in Bankruptcy of Pricy A. Varney and Nancy Jane Varney, by Browning & Reed, Stratton & Stephenson, His Attorneys.

IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 4, 1929

Now comes W. K. Elliott, Trustee in Bankruptcy of Pricy A. Varney and Nancy Jane Varney, and files this his assignment of errors, complaining as follows:

[fol. 13] (1) That the order of the District Court allowing the claim of John B. Varney for $3,000.00 was contrary to law, in that it was based upon a ruling that it was inequitable to decree the expunction of said claim.

(2) In that it permitted the claimant to make proof of claim on liabilities of the bankrupts which were not a fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition in bankruptcy.

(3) In that the endorsement of the bankrupt on a negotiable instrument not due at the date of the bankruptcy was allowed as a claim against the bankrupt estate.

(4) In that it was in effect held that an objection or petition to expunge might not be filed against a claim at any time during the pendency of the bankruptcy proceedings.

(5) In that it was, in effect, held that the Trustee had been guilty of laches in not filing his petition to expunge or objection at an earlier date.

Browning & Reed, Stratton & Stephenson, Attorneys for Trustee.

Bond on appeal for $200.00 approved; omitted in printing.

[fol. 14] IN UNITED STATES DISTRICT COURT

STIPULATION RE APPEAL—Filed June 4, 1929

It is hereby stipulated and agreed that compliance with Equity Rule 75 and each and every part thereof, is hereby waived on the appeal of W. K. Elliott, Trustee in Bank-

ruptcy of Pricy A. Varney and Nancy Jane Varney, appellant, and John B. Varney, appellee; that neither party thereto shall be required to file a præcipe; that notice of the intention to file a petition for appeal is waived.

Pursuant to Equity Rule 77, and with the approval of the Honorable A. M. J. Cochran, Judge of the United States District Court for the Eastern District of Kentucky, it is further stipulated that the following agreed statement of record on appeal, when filed in the office of the Clerk of the District Court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than the decree, and such statement shall be copied and certified to the Appellate Court as the record on appeal.

[fol. 15] IN UNITED STATES DISTRICT COURT

AGREED STATEMENT OF RECORD ON APPEAL

(1) Pricy A. Varney and Nancy Jane Varney were adjudged bankrupts on their voluntary petition in the United States District Court for the Eastern District of Kentucky, on the 3rd day of August, 1925, and their cases referred to the Honorable B. O. Becker, one of the referees, before whom both proceedings are now pending. Thereafter, on August 18, 1925, W. K. Elliott, Esquire, appellant herein, was appointed, qualified and is now acting as trustee of each estate.

(2) On August 18, 1925, the appellee, John B. Varney, filed a claim against the estates of each of the bankrupts based on a note, copy of which follows:

$3,000. Williamson, W. Va., Oct. 3, 1924.

Two years after date I promise to pay to the order of W. P. T. Varney, three thousand (Pay $3,000 and 00 cts.) Dollars, value received, negotiable and payable at the Day and Night Bank, Williamson, W. Va.

(Signed) Fred H. Varney.

Endorsed on the reverse side: Nancy Jane Varney, Pricy A. Varney, W. P. T. Varney.

An order was that day entered allowing the claim for the full amount in each bankruptcy.

(3) On February —, 1926, a dividend of ten per cent was declared and paid on the claim allowed against Pricy A. Varney's estate. This dividend was paid from income of the estate. No property of this estate nor of Nancy Jane Varney's estate has been sold.

(4) On July 25, 1927, the Trustee filed a petition to re-examine and expunge these claims in both estates, alleging that in the administration of the estate of these bankrupts the trustee on October 17, 1925, filed a petition to re-examine and expunge a claim of the First National Bank of Pikeville predicated on three notes endorsed by the bankrupts, none of which were due at the adjudication. One of the grounds of objection was that the note was not provable under Section 63-A because not absolutely owing at the date of adjudication. The referee denied the prayer of the trustee's petition on January 26, 1926. The District Court granted the prayer of the petition and sustained the exception of the trustee on May 26, 1926, on the ground [fol. 16] of non-protest of one and that two of said notes fell due more than one year from the date of adjudication, and the action of the District Court was affirmed by this court on May 13, 1927, on the ground that none of said notes were provable under 63-A4 of the Bankruptcy Act, the case being First National Bank v. Elliott, 19 F. (2d) 426. The right of review expired June 12, 1927.

The petitions further alleged (1) that these claims were not provable under the Bankruptcy Act 63A; and, (2), that they were not provable until the due date of the note, which, as it was more than twelve months from the date of the bankruptcies, barred their proof.

(5) Answers were filed by the claimant pleading (a) laches in the trustees; (b) provability of the claim under section 63-A of the Bankruptcy Act; and (c), estoppel based on prejudice to the claimant by reason of the delay in filing the petition to re-examine and by reason of the payment of the dividend in the Pricy A. Varney estate.

(6) The answer of claimant likewise showed claimant was prejudiced by the delay in filing the petition to re-examine in that no petition to re-examine or expunge be-

ing filed before the maturity of the note upon which the claim is based, the claimant believed there could be, and was, no question as to the provability of the claim, and accordingly, the note was not protested at maturity; and, since not so protested, the endorsers and bankrupts can not be held liable after their discharge; whereas, if a petition to re-examine had been filed within one year, or at any time before the note matured, it would have been protested and in that case, if finally held not to be a provable claim, it would have been a collectable debt against the bankrupts after their discharge.

(7) A stipulation was filed agreeing that at the time the petitions were filed and continuously to that time the payor and payee of the note were wholly insolvent and both had been discharged in bankruptcy.

(8) The referee sustained the petition to re-examine the claims and expunged them.

(9) A petition for review was duly taken to the District Court and that Court set aside the order of the Referee and directed the allowance of the claim on 4 day of June, 1929.

(10) It was agreed that the two petitions for re-examination to expunge might be heard together on the same record.

[fol. 17] Agreed.

Stratton & Stephenson, Browning & Reed, Solicitors for Appellant, W. K. Elliott, Trustee. Randolph Bias, Solicitor for John B. Varney.

Approved. A. M. J. Cochran, District Judge.

Citation, in usual form, showing service on Randolph Bias, omitted in printing.

[fol. 18] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 19] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF KENTUCKY

In Bankruptcy

In the Matter of PRICY A. VARNEY, Bankrupt

In the Matter of NANCY JANE VARNEY, Bankrupt

ORDER ON PETITION FOR REVIEW OF CLAIM OF J. M. SMITH AND A. B. SCOTT—Filed June 4, 1929

The petition for review of the order of the Honorable B. O. Becker, Referee, entered December 17, 1927, coming on to be heard and the court being advised, it is ordered that said petition for review be sustained; that the order of the Referee be set aside, the claim allowed, and this proceeding is remanded to the Referee for further proceedings consistent herewith.

A. M. J. Cochran, Judge.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL—Filed June 4, 1929

The petition for appeal of W. K. Elliott, Trustee in bankruptcy of Pricy A. Varney and Nancy Jane Varney, and the assignment of errors is ordered filed, and said appeal is allowed on the execution of a bond by the Trustee, in the sum of Two Hundred.

Thereupon the Trustee presented his bond, with Stanley Reed, as surety, which bond is approved.

A. M. J. Cochran, Judge.

[fol. 20] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, CLAIM OF J. M. SMITH AND A. B. SCOTT—Filed June 4, 1929

To the Honorable A. M. J. Cochran, judge of the United States District Court for the Eastern District of Kentucky:

Your petitioner, W. K. Elliott, Trustee in Bankruptcy of Pricy A. Varney and Nancy Jane Varney, conceiving himself aggrieved by a certain order entered herein on the 4 day of June, 1929, in the above entitled proceedings setting aside the order of the Referee entered December 17, 1927, expunging the claim of J. M. Smith and A. B. Scott for $7,560.00, and directing that this claim be allowed, does hereby petition for an appeal from the said order of the District Court for the Eastern District of Kentucky, to the United States Circuit Court of Appeals for the Sixth Circuit, and prays that his appeal may be allowed, and that a citation may be granted, directed to said J. M. Smith and A. B. Scott, commanding them to appear before the United States Circuit Court of Appeals for the Sixth Circuit to hear and receive that which may pertain to justice to be done in the premises; that a transcript of the record and evidence in said proceedings, duly authenticated may be transmitted to the United States Circuit Court of Appeals for the Sixth Circuit.

W. K. Elliott, Trustee in Bankruptcy of Pricy A. Varney and Nancy Jane Varney, by Browning & Reed, Stratton & Stephenson, His Attorneys.

[fol. 21] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS—Filed June 4, 1929

Now comes W. K. Elliott, Trustee in Bankruptcy of Pricy A. Varney and Nancy Jane Varney, and files this his assignment of errors, complaining as follows:

(1) That the order of the District Court allowing the claim of J. M. Smith and A. B. Scott for $7,560.00 was con-

trary to law, in that it was based upon a ruling that it was inequitable to decree the expunction of said claim.

(2) In that it permitted a claimant to make proof of claim of liabilities of the bankrupt, which were not a fixed liability as evidenced by a judgment or instrument in writing, absolutely owing at the time of the filing of the petition in bankruptcy.

(3 In that the endorsements of the bankrupts on negotiable instruments not due at the date of the bankruptcy were allowed as claims against the bankrupt estate.

(4) In that it was in effect held that an objection or petition to expunge may not be filed against a claim at any time during the pendency of the bankruptcy proceedings.

(5) In that it was in effect held that Trustee had been guilty of laches on not filing his petition to expunge or objection at an earlier date.

Browning & Reed, Stratton & Stephenson, Attorneys for Trustee.

Bond on appeal for $200.00, approved and filed June 4, 1929, omitted in printing.

[fol. 22] IN UNITED STATES DISTRICT COURT

STIPULATION RE APPEAL—Filed June 4, 1929

It is hereby stipulated and agreed that compliance with Equity Rule 75 and each and every part thereof, is hereby waived on the appeal of W. K. Elliott, Trustee in Bankruptcy of Pricy A. Varney and Nancy Jane Varney, appellant, and J. M. Smith and A. B. Scott, appellees; that neither party thereto shall be required to file a præcipe; that notice of the intention to file a petition for appeal is waived.

Pursuant to Equity Rule 77, and with the approval of the Honorable A. M. J. Cochran, Judge of the United States District Court for the Eastern District of Kentucky, it is further stipulated that the following agreed statement of

record on appeal, when filed in the office of the Clerk of the District Court, shall be treated as superseding, for the purposes of the appeal, all parts of the record other than [fol. 23] the decree, and such statement shall be copied and certified to the Appellate Court as the record on appeal.

IN UNITED STATES DISTRICT COURT

AGREED STATEMENT OF RECORD ON APPEAL

(1) Pricy A. Varney and Nancy Jane Varney were adjudged bankrupts on their voluntary petition in the United States District Court for the Eastern District of Kentucky, on the 3rd day of August, 1925, and their cases referred to the Honorable B. O. Becker, one of the referees, before whom both proceedings are now pending. Thereafter, on August 18, 1925, W. K. Elliott, Esquire, appellant herein was appointed, qualified, and is now acting as Trustee of each estate.

On August 18, 1925, the appellees, J. M. Smith and A. B. Scott, filed a claim against the estates of each of the bankrupts, based on three notes a copy of each of which follows:

"$2,400.00. Williamson, W. Va., Oct. 3rd, 1924.

One year after date I promise to pay to the order of W. P. T. Varney Twenty four hundred Dollars, Value received, Negotiable and payable at The Day and Night Bank, Williamson, W. Va., with 6% interest.

Ferd H. Varney.

Endorsement on back: Pricy A. Varney, Nancy Jane Varney."

"$2,400.00. Williamson, W. Va., Oct. 3rd, 1924.

Two years after date I promise to pay to the order of W. P. T. Varney Twenty Four Hundred Dollars, Value [fol. 24] received, Negotiable and payable at The Day and Night Bank, Williamson, W. Va., with 6% interest.

Ferd H. Varney.

Endorsement on back: Pricy A. Varney, Nancy Jane Varney."

"$2,400.00 Williamson, W. Va., Oct 3rd, 1924.

Three years after date I promise to pay to the — of W. P. T. Varney Twenty Four Hundred Dollars, Value received, Negotiable and payable at The Day and Night Bank, Williamson, W. Va., with 6% interest.

Ferd H. Varney."

Endorsement on back: "Pricy A. Varney, Nancy Jane Varney."

An order was that day entered allowing the claim for the full amount in each bankruptcy.

(3) On February —, 1926, a dividend of ten per cent was declared and paid on the claims allowed against Pricy A. Varney's estate. This dividend was paid from income of the estate. No property of this estate, nor Nancy Jane Varney's estate has been sold.

(4) On July 25, 1927, the trustee filed a petition to re-examine and expunge these claims in both estates, alleging that in the administration of the estate of these bankrupts the Trustee on October 17, 1925, filed a petition to re-examine and expunge a claim of the First National Bank of Pikeville, predicated on three notes endorsed by the bankrupts, none of which were due at the adjudication. One of the grounds of objection was that the note was not provable under Section 63-A of the Bankruptcy Act, because not absolutely owing at the date of adjudication. The Referee denied the prayer of the Trustee's petition on January 26, 1926. The District Court granted the prayer of the petition and sustained the exception of the Trustee on May 26, 1926, on the ground of non-protest of one, and that two of said notes fell due more than one year from the date of adjudication, and the action of the District Court was affirmed by this court on May 13, 1927, on the ground that none of said notes were provable under Section 63A-4 of the Bankruptcy Act, the case being First National Bank v. [fol. 25] Elliott, 19 F. (2) 426. The right of review expired June 12, 1927.

The petition further alleged (1) that these bankrupts were endorsers only on each of said notes at the time of said bankruptcy; that none of said notes were a fixed liability absolutely owing at the time of the filing of the peti-

tion in bankruptcy, and none of them were then payable; (2) that two of said notes were not due, and would not become due for more than twelve months after the date of these bankruptcies, and neither of them will become a fixed liability nor will either be absolutely owing, until the due date thereof, and until proper proceedings are taken for fixing the liability of the endorsers by presentment and notice of dishonor.

(5) Answers were filed by the claimant pleading (a) laches in the Trustee; (b) provability of the claim under Section 63-A of the bankruptcy act; (c) estoppel based on prejudice to the claimants by reason of the delay in filing petition to re-examine, and by reason of the payment of the dividend in the Pricy A. Varney estate.

(6) The answer of claimants likewise showed claimants were prejudiced by the delay in filing the petition to re-examine, in that no petition to re-examine or expunge being filed before the maturity of the second note upon which the claim is based, the claimants believed there could be, and was no question as to the provability of this note, and accordingly the note was not protested at maturity, and since not so protested the endorsers and bankrupts can not be held liable after their discharge, whereas if the petition to re-examine had been filed within one year, or at any time before the note matured, it would have been protested, and in that case, if finally held not to be a provable claim, it would have been a collectable debt against the bankrupts after their discharge. The first note, maturing October 3, 1925, was duly protested. The third note, maturing after the petition to re-examine was filed was duly protested.

(7) A stipulation was filed agreeing that at the time the petitions were filed and continuously to that time, the payor and payee of the three notes were wholly insolvent and both had been discharged in bankruptcy.

(8) The Referee sustained the petition to re-examine the claims, and expunge them.

(9) The petition for review was duly taken to the District Court, and that court set aside the order of the Referee, and directed the allowance of the claim on the 4 day of June, 1929.

[fol. 26] (10) It was agreed that the two petitions for re-examination and to expunge might be heard together on the same record.

Agreed.

Stratton & Stephenson, Browning & Reed, Solicitors for W. K. Elliott, Trustee in Bankruptcy of Pricy A. Varney and Nancy Jane Varney. Randolph Bias, Solicitors for J. M. Smith and A. B. Scott.

Approved. A. M. J. Cochran, United States District Judge.

Citation, in usual form, showing service on Randolph Bias, omitted in printing.

[fols. 27 & 28] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 29] In United States District Court, Eastern District of Kentucky

In Bankruptcy

In the Matter of Nancy Jane Varney, Bankrupt

Order on Petition for Review of Claim of A. G. Rutherford—Filed June 4, 1929

The petition for review of the Trustee, W. K. Elliott, of the order of the Honorable B. O. Becker, Referee, entered December 17, 1927, coming on to be heard, and the court being advised, it is ordered that said petition for review be overruled; that the order of the Referee be affirmed, the claim allowed, and this proceeding is remanded to the Referee for further proceedings consistent herewith.

A. M. J. Coleman, Judge.

IN UNITED STATES DISTRICT COURT

ORDER ALLOWING APPEAL, A. G. RUTHERFORD CLAIM—Filed June 4, 1929

The petition for appeal of W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney and the assignment of errors is ordered filed, and said appeal is allowed upon execution of bond by the Trustee in the sum of Two Hundred.

Thereupon, the Trustee presented his bond with Stanley Reed as surety, which bond is approved.

A. M. J. Cochran, Judge.

[fol. 30] IN UNITED STATES DISTRICT COURT

PETITION FOR APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT, CLAIM OF A. G. RUTHERFORD—Filed June 4, 1929

To the Honorable A. M. J. Cochran, judge of the United States District Court for the Eastern District of Kentucky:

Your petitioner, W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney, conceiving himself aggrieved by the certain order endered herein on 4 day of June, 1929, in the above entitled proceedings, affirming the order of the Referee entered December 17, 1927, refusing to reconsider the claim of A. G. Rutherford for $15,000.00, and directing that this claim be allowed, does hereby petition for an appeal from the said order of the District Court for the Eastern District of Kentucky, to the United States Circuit Court of Appeals for the Sixth Circuit, and prays that his appeal may be allowed, and that a citation may be granted, directed to said A. G. Rutherford, commanding him to appear before the United States Circuit Court of Appeals for the Sixth Circuit to hear and receive that which may pertain to justice to be done in the premises; that a transcript of the record and evidence in said proceedings, duly au-

thenticated, may be transmitted to the United States Circuit Court of Appeals for the Sixth Circuit.

W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney, by Browning & Reed, Stratton & Stephenson, His Solicitors.

[fol. 31] IN UNITED STATES DISTRICT COURT

ASSIGNMENT OF ERRORS, CLAIM OF A. G. RUTHERFORD—Filed June 4, 1929

Now comes W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney, and files this, its assignment of errors, complaining as follows:

(1) That the order of the District Court affirming the order of the Referee, allowing the claim of A. G. Rutherford for $15,000.00 was contrary to law, in that it was based upon a ruling that it was inequitable to decree the expunction of said claim;

(2) In that it permitted the claimant to make proof of claim on a liability of the bankrupt which was not a fixed liability as evidenced by a judgment or instrument in writing absolutely owing at the time of the filing of the petition in bankruptcy;

(3) In that the endorsement of the bankrupt on a negotiable instrument not due at the date of the bankruptcy was allowed as a claim against the bankrupt estate;

(4) That it was, in effect, held that an objection or petition to expunge might not be filed against a claim at any time during the pendency of the bankruptcy proceedings;

(5) In that it was, in effect, held that the trustee had been guilty of laches in not filing his petition to expunge or objection at an earlier date;

(6) In that the ruling of the District Court determined that a claim filed upon two notes of different parties could not have the validity of each of said notes determined in separate reconsiderations and exceptions.

Browning & Reed, Stratton & Stephenson, Solicitors for W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney.

[fol. 32] Bond on appeal for $200.00, approved and filed June 4, 1929, omitted in printing.

IN UNITED STATES DISTRICT COURT

STIPULATION RE APPEAL—Filed June 4, 1929

It is hereby stipulated and agreed that compliance with Equity Rule 75, and each and every part thereof, is hereby waived on the appeal of W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney, appellant, and A. G. Rutherford, appellee; that neither party thereto shall be required to file a præcipe, and that notice of intention to file a petition for appeal is waived.

[fol. 33] Pursuant to Equity Rule 77, and with the approval of the Honorable A. M. J. Cochran, Judge of the United States District Court for the Eastern District of Kentucky, it is further stipulated that the following agreed statement of record on appeal, when filed in the office of the Clerk of the District Court, shall be treated as superseding, for the purposes of the appeal, all parts of the record, other than the decree, and such statement shall be copied and certified to the Appellate Court as the record on appeal.

IN UNITED STATES DISTRICT COURT

AGREED STATEMENT OF RECORD ON APPEAL

(1) Nancy Jane Varney was adjudged a bankrupt on her voluntary petition, in the United States District Court for the Eastern District of Kentucky, on the 3rd day of August, 1925, and her case was referred to the Honorable B. O. Becker, one of the referees, before whom said proceeding is now pending. Thereafter, on August 15, 1925, W. K. Elliott, Esquire, appellant herein, was appointed, qualified and is now acting as trustee of said estate.

(2) On August 18, 1925, the appellee, A. G. Rutherford, filed a claim against the estate of the bankrupt based on two notes, one for $38,000.00, signed by the bankrupt, and

one for $15,000.00, which was in words and figures as follows:

"$15,000.00. Williamson, W. Va., September 25, 1924.

One year after date I promise to pay to the order of W. P. T. Varney Fifteen Thousand Dollars, Value received, negotiable and payable at the Day and Night Bank, Williamson, W. Va., with 6% interest.

Pricy A. Varney."

[fol. 34] Endorsements on back: "Nancy Jane Varney, W. P. T. Varney, J. M. Pinson."

An order was that day entered allowing the claim of the appellee as predicated upon both of said notes.

A petition for re-examination was thereafter filed by the Trustee, directed solely against the $38,000.00 note, which petition was allowed, and the claim, so far as it was predicated upon the $38,000.00 note, was expunged. On petition for review to the District Court and appeal to the Circuit Court of Appeals for the Sixth Circuit the action of the Referee was affirmed.

(3) No dividend has been declared of paid on the $15,000.00 claim allowed against Nancy Jane Varney's estate. A dividend of ten per cent was declared and paid, on February —, 1926, on the $15,000.00 claim based on the above note, from the estate of Pricy A. Varney, bankrupt, and maker of the note.

(4) On July 25, 1927, the Trustee filed a petition to re-examine and expunge this claim in the Nancy Jane Varney estate, alleging that in the administration of that estate, the Trustee, on October 27, 1925, filed a petition to re-examine and expunge a claim of the First National Bank of Pikeville, predicated upon three notes endorsed by the bankrupt, none of which were due at the adjudication. One of the grounds of objection was that the notes were not provable under Section 63A, because absolutely owing at the date of adjudication. The Referee denied the prayer of the Trustee's petition on January 26, 1926. The District Coprt granted the prayer of the petition, and sustained the exception of the Trustee, on May 26th, 1926, on the ground of non-protest of one and that two of said notes fell due

more than one year from the date of adjudication, and the action of the District Court was affirmed by this court on May 13, 1927, on the ground that none of said notes were provable under Section 63-A 4 of the Bankruptcy Act, the case being First National Bank v. Elliott, 19 F. (2d) 426. The right of review expired June 12, 1927.

The petition further alleged that this claim was not provable under the Bankruptcy Act, 63-A, because of the fact that it was an endorsement of the bankrupt on a note not absolutely owing at the date of the adjudication.

(5) An answer was filed by the claimant, alleging:

(a) That the note was the basis for a provable claim, [fol. 35] because it fell due on September 24, 1925, within on- year from the date of bankruptcy;

(b) That it would be grossly inequitable, after the expiration of the time within which claims might be proven, to reconsider the allowance of the claim under Section 57-K of the Act of May 27, 1926. No proper cause or good reason, or equities, for such action appearing;

(c) That the conduct of the Trustee by remaining silent and failing to move for a period of two years after the claim was proven and allowed, and the time for filing an amended or new proof of loss had expired, was contrary to the rules of equity and the dictates of natural justice.

(d) That the delay of the trustee had prejudiced the rights of the claimant, and his petition is barred by lapse of time (laches).

(e) That the note in question is in legal effect the joint note of the three Varneys, Nancy Jane, Pricy A., and W. P. T.; that the liability of each of whom was fixed and definite, and in nowise contingent or unliquidated at the time of the filing of the proof of loss.

(f) That Pricy A. Varney and Nancy Jane Varney were adjudged bankrupts simultaneously, and W. P. T. Varney, the payee of the note, before said petitions were filed was notoriously and hopelessly insolvent and bankrupt, which was known to Pricy A. Varney and Nancy Jane Varney; that, therefore, the note was, in fact, at the time of the filing of the petition, a fixed liability absolutely owing.

(g) That petitioner's objection against the claim because the liability on the endorsement did not mature until one month after the adjudication, was without merit for the reason that it became a fixed liability on its due date, within a year after bankruptcy, and if objection, to the claim had been made within the year, an amended proof of claim could and would have been filed, it having been protested.

(h) Because of the knowledge of the bankruptcy and the inability of the payee of the note to pay one per cent of his liabilities, the bankrupt knew at the time her petition was filed that she would be required to pay, in so far as here assets would go, said note, it was therefore a fixed liability absolutely owing;

(i) That the Trustee had filed exceptions to and petition to expunge the claim based on the $38,000.00 note, and had filed none on the $15,000.00 note; that this lulled the claimant to security, and if this had not been done, he [fol. 36] would have filed an amended or new proof of claim as to the $15,000.00 note;

(j) By an amended answer, defendant further pleaded:

A. That the long delay—of nearly two years—was and is prejudicial, and therefore inequitable to him, for the reason that he was and has been deprived of his opportunity to bring an action against the said bankrupt in her individual capacity, and thereby to have secured an early judgment as against her, and a priority of lien over such property as she may have acquired since her adjudication in bankruptcy; provided, as of course, that the petitioner's proposition of law to the effect that the claim was not provable, be well taken in law, which position of the said Trustee the said Rutherford says is not sound.

B. That it would be prejudicial, and therefore inequitable, to allow a re-examination of the claim—for Fifteen Thousand Dollars ($15,000.00)—at this late day for the reason that it would involve the said Rutherford in double expense and cost in relation to what would be practically two separate proceedings—the case involving the note of said Rutherford for Thirty Eight Thousand Dollars ($38,000.00) being now already in the Circuit Court of Appeals. The said Rutherford says that the facts, briefly stated, upon

which this ground of demurrer is predicated, consist in the following:

That the voluntary petition of Nancy Jane Varney was filed on the 3rd day of August, 1925; that she was adjudicated a bankrupt on August 18, 1925; that on the latter day petitioner Elliott was appointed Trustee; that on the said 18th day of August, 1925, Rutherford filed proof of his claim, the claim consisting of two notes, one of $15,000.00, and the other of $38,000.00—the aggregate of the notes with interest being, according to the proof, $54,501.25; that on the last named date the Trustee filed objections incorporated in a petition to expunge so much of the claim as related to the $38,000.00 note—both notes having been set up in the same proof of claim—but did not object or except to, nor move to expunge the item of $15,000.00; that subsequently, on two separate occasions, Elliott amended his objections and petition, but each time confined his objections and amendments to the $38,000.00 note, at no time challenging the validity of the $15,000.00 note. On the said 18th day of August, 1925, the Referee entered an order allowing the $15,000.00 note as a valid claim against the [fol. 37] estate. That in February 1926, a dividend of ten per cent (10%) on the $15,000.00 note was by the Referee ordered paid and that thereupon the Trustee did pay the same out of the estate. Of the said Nancy Jane Varney, or out of the estate of Pricy A. Varney, or out of both estates, the precise facts arising on this matter will be shown by the records on file in the Referee's office.

And on motion to expunge the Thirty eight Thousand Dollars ($38,000.00) note, the Referee on April 30, 1926, did sustain the same; that on May 12, 1926, Rutherford by his petition sought a review of the Referee's decision on the $38,000.00 note; that the matter was heard by District Judge Cochran, and his decision rendered on November 3, 1926, adversely to Rutherford; that an order granting an appeal was had and the case was taken to the Circuit Court of Appeals for review; that briefs were filed and oral arguments made, and that at this time the said case is in the breast of the Court awaiting final decision by that tribunal.

That it would be highly inequitable, unjust and prejudicial to Rutherford at this late day for the Court to allow a re-examination of so much — Rutherford's claim as relates to the $15,000.00 note, for if this be done it will involve

Rutherford in practically double expense of conducting the litigation, including traveling expenses of counsel, the procuring and certification of the record and the printing of the same; preparation and printing of briefs and double time of counsel in attendance upon the various courts—the Referee's Court, the District Court and the Circuit Court of Appeals. The said Rutherford says that therefore for this reason the prayer of the petition last filed by the Trustee ought not to be granted.

(6) The claimant A. G. Rutherford, further filed an amended proof of claim, setting up protest duly made, with copy thereof. It is admitted that protest was made in proper time and in due form.

(7) It was stipulated before the Referee that Nancy Jane Varney at the date of adjudication in bankruptcy had personal knowledge of the insolvency of the maker and all endorsers of the note in question, and that nothing could be realized by the claimant then or since from any obligor, except such payment as might be obtained through dividends from the estate of the maker, Pricy A. Varney. That when said note matured, it was duly and regularly presented for payment, where payable, payment refused, the note dishonored and protested, and due and regular notice of protest given to the endorser, the bankrupt.

[fol. 38] (8) The matter was submitted on the petition, answer and stipulation, and the Referee overruled the petition to examine the claim.

(9) The petition for review was duly taken to the District Court, and that court affirmed the order of the Referee, directing the allowance of the claim 4 day of June, 1929.

Agreed.

Browning & Reed, Stratton & Stephenson, Solicitors for Appellant, W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney. Randolph Bias, Goodykoontz & Slaven, Solicitors for A. G. Rutherford.

Approved. A. M. J. Cochran, District Judge.

Citation, in usual form, showing service on Goodykoontz & Slaven, omitted in printing.

[fols. 39 & 40] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 41] Appearance of counsel omitted in printing.

Minute entry of argument and submission, February 19, 1930, omitted in printing.

IN UNITED STATES CIRCUIT COURT OF APPEALS, SIXTH CIRCUIT

JUDGMENT—Filed April 18, 1930

No. 5456

Appeal from the District Court of the United States for the Eastern District of Kentucky

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Kentucky and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby reversed and remanded for further proceedings consistent with the opinion of this court.

[fol. 42] IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Filed April 18, 1930

No. 5457

Appeal from the District Court of the United States for the Eastern District of Kentucky

This cause came on to be heard on the transcript of the record from the District Court of the United States for

the Eastern District of Kentucky and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby reversed and remanded for further proceedings consistent with the opinion of this court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Filed April 18, 1930

No. 5458

Appeal from the District Court of the United States for the Eastern District of Kentucky

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Kentucky and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby reversed and remanded for further proceedings consistent with the opinion of this court.

[fol. 43] IN UNITED STATES CIRCUIT COURT OF APPEALS

JUDGMENT—Filed April 18, 1930

No. 5459

Appeal from the District Court of the United States for the Eastern District of Kentucky

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Kentucky and was argued by counsel.

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be and the same is hereby reversed

and remanded for further proceedings consistent with the opinion of this court.

IN UNITED STATES CIRCUIT COURT OF APPEALS

OPINION—Filed April 18, 1930

Nos. 5456-7-8-9

Before Denison and Hicks, Circuit Judges, and Raymond, District Judge

Per CURIAM:

The several appellees are claimants against the bankrupt estates of Nancy Jane Varney and/or Pricy A. Varney for amounts due upon promissory notes upon which bankrupts are indorsers. The issues are substantially the same in each case and the fundamental question presented (except as hereinafter noted) is the same as that considered in the case of First National Bank of Pikeville, Kentucky, v. Elliott, 19 Fed. (2d) 426 (C. C. A. 6). It was concluded in that case that debts which are provable in bankruptcy within any of the categories of sec. 63-a of the Bankruptcy Act must be such as are subject to liquidation as of the date of the filing of the petition, and which then exist as a fixed liability absolutely owing, whether or not then due [fol. 44] and payable. None of the notes in question had matured at the time the petition in bankruptcy was filed and on none of the notes was there waiver of protest, demand, presentment, or notice. The Uniform Negotiable Instruments Act in force in Kentucky states without qualification the warranty of an indorser as follows:

"And, in addition, he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent endorser who may be compelled to pay it." Carrolls Ky. Stat. 1930 Ed., 3720b-66.

The Kentucky Statutes also provide that presentment for payment is necessary in order to charge indorsers, except under circumstances not existing in this case. (See

sec. 3720b-70 Carrolls Ky. Stat., 1930 Ed.) None of the notes having matured prior to adjudication there had been, of course, no presentment or notice of dishonor. These obligations were therefore not such as at the date of the filing of the petition existed as a fixed liability absolutely owing.

It is sought to distinguish the First National Bank case (above cited) from the present cases upon the fact that in that case the notes sought to be proved were collateral notes indorsed by the bankrupt and attached to other notes owned by claimants to which the bankrupts were not parties. Under our interpretation there made of sec. 63-a of the Bankruptcy Act this difference cannot affect the result. The distinction is not between collateral and direct obligations, but between those which are fixed and absolute, and those which are merely contingent.

A further question arises out of these facts: the several claims were filed and allowed on August 18th, 1925. In February, 1926, a dividend of 10 per cent was paid on each note. On July 25, 1927 (about two and a half months after decision of the First National Bank case), the trustee filed a petition to re-examine and expunge the several claims upon the ground that upon the date of the adjudication they were not due and that there was not a fixed liability owing [fol. 45] at the time of the filing of the petition in bankruptcy. The answers to these petitions alleged laches, provability under sec. 63-a, and estoppel by reason of delay and payment of dividends. In 5456, 5457 and 5458 the referee sustained the petition to re-examine and was overruled by the District Court. As to the Rutherford claim, it was also urged that a petition for re-examination upon another note in favor of the same claimant had been already adjudicated, and without making any objection to this claim. This petition to expunge was denied by the referee, who was sustained by the District Court. Sec. 57-k of the Bankruptcy Act provides:

"Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed."

We find in the record no evidence of injury, prejudice, or disadvantage to claimants which would make it inequi-

table to allow the trustee to file his petition for re-examination. In re Star Spring Bed Co., 265 Fed. 133; In re Calendonia Coal Co., 254 Fed. 742.

In view of the provisions of sec. 57-l of Bankruptcy Act, which says: "Whenever a claim shall have been reconsidered and rejected in whole or in part, upon which a dividend has been paid, the Trustee may recover from the creditor the amount of the dividend received upon the claim, if rejected in whole, or the proportional part thereof, if rejected only in part," it seems clear that the mere payment of dividend upon a claim cannot operate as an estoppel to a petition later filed to re-examine and expunge.

The orders of the court below are reversed, and the cases remanded for further proceedings in accordance with this opinion.

[fol. 46] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 47] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 239

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 48] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 240

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is

granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 49] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930.

No. 241

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 50] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1930

No. 242

ORDER ALLOWING CERTIORARI—Filed October 13, 1930

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Sixth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Endorsed on cover: File No. 35,161. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 239. Alvis Maynard, Administrator of Mary A. Ronan, Deceased, Petitioner, vs. W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney. File No. 35,162. U. S. Circuit Court of Appeals, Sixth Circuit. Term No.

240. John B. Varney, Petitioner, vs. W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney. File No. 35,163. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 241. J. M. Smith and A. B. Scott, Petitioners, vs. W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A, Varney. File No. 35,164. U. S. Circuit Court of Appeals, Sixth Circuit. Term No. 242. A. G. Rutherford, Petitioner, vs. W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney. Filed June 30, 1930. File No-. 35,161, 35,162, 35,163, 35,164.

(44)

FILE COPY

Office Supreme Court, U. S.
FILED
JUN 30 1930
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

No. 239

ALVIS MAYNARD, ADMINISTRATOR OF MARY A. RONAN, DECEASED, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

No. 240

JOHN B. VARNEY, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

No. 241

J. M. SMITH AND A. B. SCOTT, PETITIONERS,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

No. 242

A. G. RUTHERFORD, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WELLS GOODYKOONTZ,
RANDOLPH BIAS,
Counsel for Petitioners.

WILLIAMSON, WEST VIRGINIA.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 239

ALVIS MAYNARD, ADMINISTRATOR OF MARY A. RONAN, DECEASED, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

No. 240

JOHN B. VARNEY, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

No. 241

J. M. SMITH AND A. B. SCOTT, PETITIONERS,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

No. 242

A. G. RUTHERFORD, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

PETITION FOR WRITS OF CERTIORARI

To the Honorable the Chief Justice and Associate Justices of said Court:

The petitioners respectfully represent that these causes were heard together and decided in a single

opinion by the Circuit Court of Appeals, and therefore they unite in this single petition and the supporting brief.

A.

Summary Statement of the Matter Involved.

1. Pricy A. Varney was the mother of Nancy J. Varney, and under the will of the husband of the former and father of the latter Pricy was given a life estate in realty, and at her death Nancy was given a life estate in the same realty. Therefore the same property is involved.

2. In the first three of these cases both women are endorsers on the notes upon which the claims in bankruptcy are proved; and in the last of the cases Pricy is the maker, and Nancy the endorser, of the note.

3. On August 3, 1925, both women filed voluntary petitions in bankruptcy, and were adjudged bankrupts.

4. On August 18, 1925, each of the petitioners filed proof of claim with the referee in bankruptcy, and the claim of each was allowed (R. 6-15-24-34).

5. The claim of Maynard (administrator of the estate of Ronan) was based on a note of $3,000.00, dated October 3, 1924, maturing one year from date, made by Ferd H. Varney, payee W. P. T. Varney, and endorsed by both bankrupts; that of John B. Varney is based on a note of $3,000.00, dated October 3, 1924, maturing two years from date, made by Ferd H. Var-

ney, payee W. P. T. Varney, and endorsed by both bankrupts; that of Smith and Scott is based on three notes of $2,400.00 each, all dated October 3, 1924, maturing one, two, and three years from date, all made by Ferd Varney, payee, W. P. T. Varney, and all endorsed by both bankrupts; that of A. G. Rutherford was based on two notes, one of $38,000.00, afterwards attacked by the trustee, re-examined and expunged, as hereinafter noted, and one of $15,000.00 dated September 25, 1924, maturing one year from date made by the bankrupt Pricy and endorsed by the bankrupt Nancy (and by another) with W. P. T. Varney as payee (R. 6-15-23 and 24 and 33).

6. The two notes of Rutherford were set up in a single proof and allowed as a single claim. Thereafter the trustee filed exceptions to the note for $38,000.00 and moved to exclude it from the claim, twice amended his petition, but did not in the original or amended petition except to the $15,000.00 note. The referee, district court, and Circuit Court of Appeals, each in order, held the $38,000.00 note an invalid claim, sustained the exceptions thereto by the trustee and finally disallowed that part of the claim based thereon (R. 34). This petition therefore relates only to the note for $15,000.00.

7. All the notes were signed in Kentucky, where bankrupts lived, made payable at a bank in West Virginia, where all the claimants live except John B. Varney (who lives in Kentucky), and the petitions were filed, and adjudications made in the District Court for the Eastern District of Kentucky.

8. In February, 1926, a dividend of ten per centum was declared and paid on each of the claims from the estate of Pricy A. Varney—the payment on the Rutherford claim being limited to the $15,000.00 note, as the petition to expunge the $38,000.00 note was then pending.

9. On May 13, 1927, the Circuit Court of Appeals for the Sixth Circuit in First National Bank *v.* Elliott, 19 F. (2nd) 426, rendered a decision, without precedent or parallel, holding that a note not due when the petition in bankruptcy is filed by an endorser thereon is not provable against the estate of a bankrupt endorser.

10. On July 25, 1927 (R. 6), the trustee filed petitions in each of these cases to expunge all the claims in both estates, basing his petitions on the decision aforesaid, and seeking to explain and excuse his delay, because of the pendency of that case—which case arose from the bankruptcy of these two women.

11. In the case of Maynard, administrator of Ronan, the note upon which claim is based matured October 3, 1925, precisely two months after the petition in bankruptcy was filed, was duly presented for payment, payment refused for dishonor, and the note protested in due form for non-payment and notice given the bankrupts, the endorsers (R. 6).

12. In the case of John B. Varney, the note matured on October 3, 1926, fourteen months after the petition in bankruptcy was filed, and since no exceptions had been taken by the trustee, and no motion

to expunge had been made, the claim had been allowed, and a dividend thereon paid, and the creditor (petitioner here) believing no exceptions could be taken if not taken within one year from the time the petition in bankruptcy was filed, this note was not withdrawn from the files of the referee and presented for payment and protested for non-payment (R. 16).

13. In the case of Smith and Scott, based on three notes for $2,400.00 each, all dated October 3, 1924, maturing in one, two, and three years from date, the first and third were duly protested, the first because the twelve months within which exceptions could and should have been taken had not expired when the note matured; the third because before it matured the petition to expunge had been filed. But the second of these notes, that maturing two years from date, maturing fourteen months after the petition in bankruptcy was filed, and before the petition to expunge was filed, was not protested, to bind the endorsers, the bankrupts (R. 25).

14. In the case of Rutherford, there were at first two notes, one of $38,000.00 which was attacked on other grounds by a petition to expunge, which petition was twice amended, and which related alone to this note of $38,000.00, which was finally expunged, and one of $15,000.00, with which alone we are here concerned. This note was dated September 25, 1924, matured one year from its date, or one month and twenty-two days after the petition in bankruptcy was filed.

At its maturity it was presented for payment, payment not made, regularly protested for non-payment and notice of protest given, and an amended proof of claim filed, showing these facts (R. 37).

15. W. P. T. Varney and Ferd. H. Varney were hopelessly and wholly insolvent at the time the petitions in bankruptcy were filed, and this fact was known to the bankrupts at the time (R. 15-25-35).

16. The referee granted the prayer of the petition to expunge in the first three cases and refused the prayer to expunge in the Rutherford case. The trial judge reversed the referee in the first three cases and affirmed him in the Rutherford case, thereby holding the claims in all four cases valid, and provable. The Circuit Court of Appeals reversed the trial court, and denied recovery, in all four cases.

B

Reasons Relied on for Allowance of Writs

1. The Circuit Court of Appeals has rendered herein a decision in conflict with the decisions of four other Circuit Courts of Appeals on a parallel state of facts.

2. The Circuit Court of Appeals has decided an important question of general law—the law of bankruptcy—in a way probably untenable and in conflict with the weight of authority.

3. The Circuit Court of Appeals herein has decided an important question of Federal law which has not been, but should be, settled by this court.

4. The Circuit Court of Appeals has herein decided an important Federal question in a way probably in conflict with applicable decisions of this court.

There is presented herewith a supporting brief, showing more fully petitioners' views on the questions involved.

WHEREFORE, your petitioners respectfully pray that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the Circuit Court of Appeals for the Sixth Circuit, commanding that court to certify and to send to this court for its review and determination, on a day certain to be therein named, a full and complete transcript of the records and all proceedings in the cases numbered and entitled on its docket, No. 5456, W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney, Appellant, *v.* Alvis Maynard, Administrator of Mary A. Ronan, Appellee; No. 5457, W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney, Appellant, *v.* John B. Varney, Appellee; No. 5458, W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney, Appellant, *v.* J. M. Smith and A. B. Scott, Appellees; and No. 5459, W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney, Appellant, *v.* A. G. Rutherford, Appellee; and that the said judgments of the Circuit Court of Appeals for the Sixth Circuit may be reversed by this Honorable Court, and that your petitioners may have such other and further relief in the

premises as to this Honorable Court may seem meet and just. And your petitioners will ever pray.

Given under our hands, this, the 16th day of July, 1930.

ALVIS MAYNARD,
Administrator of Mary Ronan,
By RANDOLPH BIAS,
Counsel for Petitioner.

JOHN B. VARNEY,
By RANDOLPH BIAS,
Counsel for Petitioner.

J. M. SMITH and A. B. SCOTT,
By RANDOLPH BIAS,
Counsel for Petitioner.

A. J. RUTHERFORD,
By WELLS GOODYKOONTZ,
RANDOLPH BIAS,
Counsel for Petitioner.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 239

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W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRITS OF CERTIORARI.

I.

The opinion of the Circuit Court of Appeals for the Sixth Circuit has not at this time been officially re-

ported. It was rendered and filed on April 18, 1930, and is copied at page 43 of the record.

II.

Jurisdiction.

1. The date of the judgments to be reviewed is April 18, 1930 (R. 41-42-43).

2. Petitioners in all four cases claim the debts of petitioners, all being based on notes of which the bankrupts were endorsers, were, and are provable debts (R. 6-15-23 and 33). The Circuit Court of Appeals reversed the trial court (Eastern District of Kentucky) and by its judgments (R. 41-42-43) and its opinion (R. 43) held that none of the debts were provable, thereby, in effect, expunging the claims and denying recovery on all of them.

3. The jurisdiction of this court is invoked under the provisions of 28 U. S. C. A., Sec. 347 (*a*) and 11 U. S. C. A. Sec. 48 (*c*).

4. The following cases sustain jurisdiction herein:

In re Watts, 190 U. S. 1;
Dunbar *v.* Dunbar, 190 U. S. 340;
Williams *v.* United States Fidelity & Guaranty Co., 236 U. S. 549.

III

Statement of the Cases.

It is believed that a full statement of the essential facts in all four cases is contained in the petition,

and in the interest of brevity, this statement will not be here repeated.

IV

Specification of Errors.

1. The Court erred, in all four cases, in holding a note not due when the petition in bankruptcy was filed is not a provable debt against the estate of the bankrupt endorser.

2. The Court erred, in the cases of Maynard, Smith and Scott, and of Rutherford, in holding that the notes which matured in less than one year after the petitions in bankruptcy were filed, and which at maturity were regularly protested and notice of protest duly given the bankrupt endorsers, were not provable debts against the estates of the bankrupts. (At the time of these proceedings below proof of debt could be made within twelve months from the filing of the petition in bankruptcy.)

3. The Court erred, in all four cases, in holding a trustee in bankruptcy, may at any time before the estate is closed (even two years after proof of debt and eighteen months after payment of dividends) regardless of the equities, obtain reconsideration of an allowed claim, based on a note not matured when the petition in bankruptcy was filed, and have the claim rejected and disallowed.

4. The Court erred, in the case of John B. Varney and as to one of the notes in the case of Smith and

Scott, in holding a note not maturing within one year from the time the petition in bankruptcy was filed by the endorser, (and which note was not protested at maturity because no attack had been made against it, and a dividend had been paid on it) might be successfully attacked by a petition to reconsider and expunge, such latter petition being filed twenty-three months after proof of debt and eighteen months after dividend paid thereon.

5. The Court erred in the Rutherford case in this: (*a*) the claim was based in part on a note for $15,000.00 which matured in less than two months after petition in bankruptcy was filed, was regularly protested and notice of dishonor given and an amended proof filed showing this; and (*b*) based partly on another note, which latter note was successfully attacked by motion and petition to expunge, which petition was twice amended (but in no wise referred to or attacked the note for $15,000.00) and heard and decided, in order, by the referee, the district court and the circuit court of appeals; after all of which, and two years after petition in bankruptcy was filed, twenty-two months after the maturity of the note, and eighteen months after a dividend was paid on it, the trustee attacked this note by a petition to expunge, which petition was denied by the referee and by the district court, but which the circuit court of appeals granted, thereby expunging the claim.

V.

ARGUMENT.

Summary of the Argument.

Point A. The decision is in conflict with, and directly opposite from, the decision of four (the Third, Fourth, Second, and Ninth) other circuit courts of appeal on the same matter. Mock *v.* Market St. Nat. Bank, 107 F. 897; Cobb *v.* Overman, 109 Fed. 65; *In re* Phillip Semmer Glass Co., 135 F. 77; Colman Co. *v.* Withoft, 195 F. 250.

Point B. The decision is of an important question of the law of bankruptcy, is untenable and in conflict with the weight of authority. Whitwell *v.* Wright, 130 N. Y. Supp. 1065; Manheim *v.* Loewe, 173 N. Y. Supp. 260; James Dunlap Carpet Co., 163 F. 541; *In re* Smith, 146 F. 923; *In re* Buzzini, 183 F. 827; *In re* Sweeney, 195 F. 250; *In re* Amdur Shoe Co., 13 F. (2nd) 147; *In re* Shatz, 251 F. 351; *In re* Letchworth, 19 F. 873; *In re* Henry & Linderman, 238 F. 639; Loveland on Bankruptcy (Third Edition) 351; Collier on Bankruptcy, Vol. 2, pp. 1399-1400; Remington on Bankruptcy, Vol 2, Sec. 777, p. 165.

Point C. The question here decided by the Circuit Court of Appeals, apparently has never been decided by this court; and is one of such general and far-reaching importance as should be settled by this court.

Point D. While this court has never decided the precise question here involved, upon reason and by an-

alogy, it has decided the question, and the decision of the circuit court of appeals herein is in conflict with those decisions. Dunbar *v.* Dunbar, 190 U. S. 340; Martin *v.* Cole, 104 U. S. 30; Riggin *v.* Magwire, 82 U. S. 549.

Point E. If it can be found the trustee had the right in any case to move to expunge the claims because based on notes not due when endorsers' petitions in bankruptcy were filed, the trustee in these cases waited too long, was guilty of such laches as that he could not be allowed to have expunged these claims. 21 *C. J.*, Secs. 211 and 238; Blanke M. & S. Co. *v.* Winnifield L. & I. Co., 290 F. 180; Loveland (Third Ed.) p. 410; Collier, Vol. 2, sec. 57, p. 1173.

Point F. In the Rutherford case, in addition to all the other reasons against granting the prayer of the petition to expunge the claim which are hereinbefore set out, is the plea of *res judicata*, which alone was ample ground for denial of the prayer and motion to expunge. Bates *v.* Bodie, 245 U. S. 520; Cromwell *v.* Sac County, 94 U. S. 351; Virginia-Carolina Chemical Co. *v.* Kirven, 215 U. S. 252; Northern Pacific Railway Co. *v.* Slaght, 205 U. S. 122.

POINT A.

The decision is in direct conflict with the decisions of four other circuit courts of appeal—and supported by the decision of no other circuit.

Until the Circuit Court of Appeals for the Sixth Circuit rendered its decision in First National Bank *v.*

Elliott, 19 F. (2nd) 426, no court, so far as we can learn, had ever held that a note not due when the endorser filed a petition in bankruptcy could not be proved against the estate of the bankrupt endorser. Having so decided that case, the court in the instant case felt bound by that decision and, therefore, reversed the trial court in all these cases, the trial court having held all the notes involved herein as provable.

The same precise question has been considered and decided by the circuit courts of appeal for the Third, Fourth, Second and Ninth circuits, *and in each instance the decision was exactly opposite the decision here.*

In Moch *v.* Market St. Nat. Bank, 107 F. 897, the court for the Third Circuit, after quoting at length the 63rd section of the bankrupt act (of 1898) said:

> "Clearly the liability of an endorser is in the very words of this fourth subdivision * * * If it can be affirmed that such an unmatured liability is not a 'debt,' in a technical sense, certainly it is a 'demand' or 'claim' and comes, it seems to us, within the scope of the fourth subdivision of section 63 of the Act."

This opinion also examines and considers the contention made here and in First National Bank *v.* Elliott, *supra,* that a portion of subdivision 1 of this section qualifies subdivision 4 thereof, and sums up its finding:

> "The first and fourth subdivisions of section 63 are distinct provisions, and are, we think, independent of each other. We are unable to

agree to the proposition that subdivision 1 qualifies, and is to be carried down and read into, subdivision 4."

In Cobb *v.* Overman, 109 F. 65, in considering the question here involved, the Circuit Court of Appeals for the Fourth Circuit held:

> "The bond in this case is a fixed obligation, its amount definite and certain, and the same was in full force and effect at the date of the filing of the petition in bankruptcy, though the liability thereunder is payable in the future, and in stated sums. The demand is clearly one the value of which can be ascertained, and hence provable under the bankruptcy act."

The facts were the same as here, except that in that case the debt was evidenced by a bond.

In a *per curiam* opinion in *In re* Phillip Semmer Glass Co., 135 F. 77, the Circuit Court of Appeals for the Second Circuit, in deciding the provability against an endorser of an unmatured note said:

> "We concur with the Court of Appeals for the Third Circuit (Moch *v.* Market St. Nat. Bank, 107 F. 897, 47 C. C. A. 49) in the conclusion that the liability of a bankrupt endorser of commercial paper which did not become absolute till after the filing of the petition is a debt provable in bankruptcy."

The case considered by the court for the Ninth Circuit was a rent case, Colman Co. *v.* Withoft, 195 F. 250, but in it was examined the law as relates to un-

matured notes against bankrupt endorsers. As to this this Court said:

> "An apparent exception to the rule that contingent claims may not be proved under section 63*a* is the case of an indorser of the commercial paper of a bankrupt not due at the time of the filing of the petition, but whose liability as indorser thereafter becomes fixed. Moch *v.* Market Street Bank, 107 Fed. 897, 47 C. C. A. 49; *In re* Semmer Glass Co., 135 Fed. 77, 67 C. C. A. 551; *In re* Smith (D. C.) 146 Fed. 923. But it may be doubted whether the liability of an indorser in that class of cases is in any true sense contingent. The extent of his liability is at all times known, for it is measured by the note itself. Upon the adjudication of bankruptcy it would seem that there is an end to the contingency that the bankrupt himself may pay the note, and that there remains between that date and the maturity of the indorser's liability nothing but a question of time. But in any view of these decisions, they are not applicable to the present case, for here there was a contingency, not only as to the amount of the liability, but as to its existence."

It is proper here to observe that for all practicable purposes every element of contingency as to the bankrupts' liability on the notes in all four suits had been removed, because at the time the petitions in bankruptcy were filed all other parties to the notes, including the makers) were insolvent, had been adjudicated bankrupts, with less than one per centum of assets to

meet liabilities, and these facts were known to the bankrupts (R. 16-25-35).

Thus, it is seen, the decision here is in direct conflict with the decisions in four other Circuit Courts of Appeal, and is supported by the decision of no other circuit.

POINT B.

The decision is in conflict with the great weight of authority.

This is clearly shown by the cases cited in the summary preceding this argument. It is significant the opinion here complained of cites a single case in its support, and that an earlier decision of the court citing it.

We would invite the court's consideration of the cases cited in the summary, largely from the Federal District Courts, in addition to those above referred to from the Circuit Courts of Appeals.

Apparently all the textwriters on the subject of bankruptcy unite in disagreeing with the decision here. Opinions of textwriters of course lack the effect of opinions of courts, but it is to be assumed those authors having, and professing to have, peculiar technical knowledge of a given branch of the law have studiously examined the statute and court decisions thereon.

Here is the conclusion of three of the best known of these textwriters.

Loveland (3rd Ed. 351) says:

> "In case the bankrupt is the person secondarily liable as an endorser or a surety, it is nec-

essary that the liability has become absolute and fixed, as by maturity, notice, and nonpayment of the debt prior to the bankruptcy proceedings to be provable under the first clause of section 63, *but the contract of endorsement may be proved under clause four of the same section.*"

Mr. Collier says (Vol. 2, p. 1399-1400):

"Where the liability of a bankrupt as an endorser or surety does not become fixed until after the filing of the petition it is not a provable debt under subdivision *a*(1) as a fixed liability absolutely owing, but if the liability becomes fixed prior to the expiration of the time for proof of claims *it is a provable debt under subdivision a*(4) as upon a contract, expressed or implied."

Mr. Remington (Vol. 2, sec. 777, p. 165) says:

"The liability of the bankrupt as endorser or surety, upon his contract of endorsement or suretyship, is a provable debt, although default has not been made by the principal until after the filing of the petition or until after adjudication. It constitutes a demand or claim, even if not a debt."

Those who hold such notes, as are here involved, not provable do so by reasoning that the Congress intended to have certain phrases of sub-division 63A1 of the Act carried down and read into sub-division A4 of that section, the phrases being "fixed liability" and "absolutely owing."

The Act says what debts are provable. The section in the Act is 63; in U. S. Code Compact Edition it is

Title Eleven, Sec. 103. The section is sub-divided into "*a*" and "*b*" and subdivision *a* has five subdivisions. That portion of it with which (and with which alone) we are here concerned reads as follows:

> "Debts of the bankrupt may be proved and allowed against the state which are * * * (4) founded upon an open account, or upon a contract express or implied."

Those who share the views of the court of the Sixth Circuit (and they are few) maintain, for some inexplicable reason, that we should borrow from sub-division A1 of this section the phrases above quoted and read them, somehow and somewhere, into subdivision A4 above quoted in full. So to hold is to say that the Congress did not know how to employ the English language and really meant something it did not say. The whole case against the provability of an unmatured note against the estate of a bankrupt endorser hangs on this strained construction of the Act. Without it there is and can be no question.

Mr. Loveland (Loveland, Fourth Edition, Sec. 294, p. 609) examines this contention and says:

> "It has been suggested that these words should be read into the fourth clause as a limitation on contract debts (citing Roth and Appel, 181 Fed. 667, and in re Swift, 112 Fed. 315). *If Congress had intended to so limit the fourth clause it would have been easy to have said so.* The fourth clause is clearly limited to debts at the time of the bankruptcy. The obligation to pay must be fixed and the amount ascertainable

at the time *although the debt may not become owing until the happening of some event.* Such claims are 'debts founded on a contract,' in which the rights of the parties are absolutely fixed as between them at the time of the filing of the petition."

POINT C.

This precise question has never been decided by this court. It should be settled by the court.

Strange to say, apparently this question has never been decided by this court. At least one case in which was involved the question was before the court, but the case was dismissed on other grounds. Since it has not been decided and the opinions of Circuit Courts of Appeals are now in conflict it is obvious the question should be finally settled by this court.

As was said by this court, in Kreitlein *v.* Ferger, 238 U. S. 21, in referring to the bankruptcy statute, "But, like them, must be considered in the light of the fact that the statute was intended for business men, and should receive not only a practical but a uniform construction." Clearly this court should, by its opinion, tell litigants, lawyers, and lower courts what is the law.

POINT D.

While this court has not decided the question, its opinions plainly indicate its decision thereon.

In at least three cases this court has rendered decisions and written opinions indicative of its holding on

this question. The first of these was Riggin *v.* Magwire, 82 U. S., 549, and since under the Act of 1841 will not be here examined at length, but is referred to for its reasoning. The second was not under the bankruptcy law at all, but was a suit on a negotiable note, and is here examined because of its definition of the contract of the parties to such an instrument, which definition definitely disposes of the contention made by those who say the contract of an endorser is not express, but contingent. The case is Martin *v.* Cole, 104 U. S. 30, and in it this court says:

> "The contract created by the indorsement and delivery of a negotiable note, even between the immediate parties to it, is a commercial contract, and is not, in any proper sense, a contract implied by the law, much less an inchoate or imperfect contract. It is an express contract, and is in writing. * * * All its terms are certain, fixed, and definite, * * *. So that the mere name of the indorsers, signed upon the back of a negotiable instrument, conveys and expresses his meaning and intention as fully and completely as if he had written out the customary obligation of his contract in full."

The last of the three cases here to be considered is Dunbar *v.* Dunbar, 190 U. S. 340. This was a bankruptcy case, and in its opinion we maintain the court said that which when applied to this case would support the contention here made. The court said:

> "Conceding that the Bankruptcy Act provides for discharging some classes of contingent demands or claims, this is not, in our opinion,

such a demand. Even though it may be that an annuity dependable on life is a contingent demand within the meaning of the Bankruptcy Act of 1898, yet this contract, so far as regards the support of a wife, is not dependable upon life alone, but is to cease in case the wife remarries. Such a contingency is not one which, in our opinion, is within the provision of the Act, because of the innate difficulty, if not impossibility, of estimating or valuing the particular contingency of widowhood."

The case the court then considered was one in which the husband by contract had agreed to pay alimony to his wife for life or so long as she remained unmarried. The Supreme Court said that the annuity part was perhaps good in spite of the contingency, but that the impossibility of saying how long a woman should remain unmarried was too great, and that, therefore, this was not a debt provable against the husband's estate in bankruptcy. How could the court have decided otherwise? We have annuity tables by which we are able to estimate the value of an annuity, but who has yet devised or invented a table to say how long any woman will remain unmarried? She may marry tomorrow, or next year, or never; and, of course it would require the rankest sort of guess to remove the contingency as to this. Therefore, this court properly held that this was not a provable debt, and was not discharged by the bankruptcy of the husband; and that, therefore, he must continue to pay the money to the wife. This case is far from being the case we now consider.

In this (the Dunbar) case Mr. Justice Peckham commented on Moch *v.* Market Street National Bank, *supra,* but did not disapprove of the holding of the Circuit Court of Appeals for the Third Circuit in that case. On the contrary, inferentially the court approved of the holding in the Moch case, as will be noticed by this sentence: "These cases" (referring to the Moch case and the case of Cobb *v.* Overman, 109 Fed. 65) "it will be seen, do not come within the principle of the case at the bar."

Observe further that in the Dunbar case this court said:

> "We think the contract, so far as it related to the payment to the wife during her life of widowhood, was not a contingent liability provable under the Act of 1898."

The language so employed by the court tells us again that at least some contingent liabilities are provable, which entirely refutes the contention now made that a contingent debt may not be proved against the bankrupt.

We submit the logic of this decision, when applied to the instant cases, calls for reversal of the circuit court of appeals, and affirmance of the bankruptcy court.

Point E.

Laches.—The trustee delayed too long in presenting his petition to expunge the claims, and the equities forbid such course, even if he might properly have so presented the matter at an earlier date.

Realizing he had delayed too long in presenting his petition to expunge the claims attacked, the trustee in his petition sought, by what savors of a plea of confession and avoidance, to excuse that delay. This plea is, other litigation pending (R. 6-15-24-34) the litigation in question being First National Bank *v.* Elliott, *supra.* The excuse is unavailing. The fact A sues B does not excuse nor mitigate his delay in suing C—in the absence of an agreement. The governing principle is thus stated:

> "It has been held that where the question in controversy is involved in a suit pending between parties, plaintiff may wait a reasonable time for a decision of that suit before bringing his own action, *where he and his adversary agree to abide by that decision,* and he is not guilty of laches in failing to prosecute an infringer of a right pending his prosecution of other infringers of the same right; but other cases hold that delay pending the decision of a test case is not excusable in the absence of an agreement to abide by the event."
>
> 21 *C. J.*, Sec. 238, page 242.

Observe that in order to escape laches there must be an agreement to abide by the decision in the other

action, and that in the absence of such agreement the pending action is not a test case, the outcome of which must be awaited before the other action is brought. Of course if these claimants had agreed with the trustee that the trustee might withhold his objections to these claims and delay filing petitions for reconsideration until the suit of the First National Bank of Pikeville against the trustee was decided, then the delay would be excused and there would be no laches; but there was no such agreement, and there is no contention that there was such an agreement.

How about the equities? Within less than a month after the petitions of the bankrupts were filed the claimants proved their claims. They were allowed without objection. Within two months after the petitions were filed the notes upon which the claim in Nos. 5456 and 5459 and one note in 5458 were based matured, were protested for nonpayment, and notices of dishonor given. They then and there became definite fixed liabilities absolutely owing by the bankrupts—if, under any circumstances it could be held there was not fixed liability absolutely owing when petitions were filed.

> "Subject to the provisions of this act, when the instrument is dishonored by nonpayment, an immediate right of recourse to all parties secondarily liable thereon, accrues to the holder."—Uniform Negotiable Instruments Law, sec. 84.

The instruments were dishonored for nonpayment, and thereupon immediately right of recourse in favor

of the claimants and against the bankrupts (they being endorsers and secondarily liable) accrued.

Yet, although beyond any question these now were debts of the bankrupts in definite amount absolutely owing, no objection was raised and no petition filed to reconsider the claims by the trustee until approximately two years after commencement of the bankruptcy proceedings. The equities forbid this. If in fact a petition to reconsider was to be filed it should have been filed before the expiration of one year from the time proceedings commenced, that claimants might, if they could do so, meet the objections by filing amended proofs of claim, or in any other proper way.

Next, counsel contended that claimants are not prejudiced by the delay and that, therefore, laches is not imputable to the trustee.

Observe that in defining laches Pomeroy says that if a disadvantage accrue to the opposing party and this disadvantage comes from "intervention of equities or other cause it is ground for denial of the relief." Here is the intervention of the equities.

Again let us examine the definition of laches given by Corpus Juris and by it boiled out of many well considered cases, from which the definition is formulated.

> "Laches in a general sense is the neglect, for an unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in the law should have been done. More specifically, it is inexcusable delay in asserting a right; an implied waiver arising from this knowledge of existing conditions and an acquiescence in them; Such neglect to assert a

right as, taken in conjunction with lapse of time more or less great, and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity; such delay in enforcing one's rights as works disadvantage to another."—21 *C. J.*, 210.

We have the neglect of the trustee to object in season, to do that in law which he should have done. He knew the conditions, and acquiesced in the situation. He neglected to assert his right until claimants were prejudiced by his delay, and he is now barred from doing what he should have done long ago. "He who remains silent when he should speak is not permitted to speak when he should remain silent."

Moreover, to permit reconsideration of claimants' claim at this juncture violates the equities in another particular. In February, 1926, six months after the commencement of bankruptcy proceedings, a dividend was declared and paid on these claims, ten per centum of each claim being paid to each claimant. Trustee's counsel says claimants are not prejudiced by this. We differ as to this. We maintain that if one asserts a claim against another and the other so recognizes the claim as not to object to it, but permits a portion of it to be paid, it is then prejudicial to the right of the claimant to later say that the sum is not owing. If you pay me money which I claim you owe me, and do it without objection or protest, then you are estopped by your own laches later to say that you did not and do not owe the money. Perhaps I have invested the money, spent it, or so used it as that it works a hard-

ship on me now to repay it. The omission to object, the remaining silent, when he should have spoken, now debars the trustee from speaking.

The trustee then invokes the bankruptcy statute which does say that claims may be reconsidered before but not after the estate has been closed. However, the statute does not say *any* claim may be so reconsidered or that *all* claims *must* be reconsidered, but simply says that before the estate is closed it *may* be reconsidered.

When may it be so reconsidered? The answer is: "According to the equities of the case." We submit that the equities of the cases deny to the trustee any rights to have the claims reconsidered. We submit a case cannot be found where a claim has been reconsidered two years after commencement of the bankruptcy proceedings and eighteen months after a dividend has been paid on a claim which has not been contested.

In the Star Spring Bed case, 265 Fed. 137, the delay was four and one-half months. In the Globe Laundry case, 198 Fed. 365, the delay was more than a year, but the court said:

> "Under Bankruptcy Act July 1, 1898, c. 541, sec. 57K, 30 Stat. 561 (U. S. Comp. St. 1901, p. 3444), which provides that 'claims which have been allowed may be considered for cause before, but not after, the estate has been closed', reconsideration should be allowed as a general rule, when asked by the trustee at any time before the estate has been closed, and a delay of more than a year, without other facts appear-

ing, and where a dividend has not been declared, is not of itself such laches as to bar a re-examination."

Other facts do appear here. There has been a dividend in this case, and we submit that the necessary inference to be drawn from the Globe Laundry case is that this fact as to that claim would have caused the court there to have decided differently and to have held there was such laches as to bar re-examination.

In the Calendonia Coal Company case, 254 Fed. 742, cited in the court's opinion, the delay was fourteen months, and the court said, among other things: "Delay alone does not constitute laches; the essential element being prejudice to another person by reason of the delay complained of." Here we have the essential element; first, in that no amended proof of claim was offered after the maturity and the protest of the notes within the year, although the notes matured and were protested two months after the proceedings commenced; and, second, and more important, because the estate was being distributed by dividends and dividends were actually paid to claimants before any objection whatever was made to claimants' claims. Therefore, it is argued the facts in Caledonia Coal Company case do not support the decisions here complained of.

Let us see what would have occurred as to these claims if in fact the trustee had objected to the claims or moved their reconsideration, without being guilty of laches. If objection had been made to the claims when they were offered or at any time before the notes

matured (that is, two months after the proceedings commenced) the claim would have been withdrawn and immediately after the notes matured, were not paid, and protested, and notice of dishonor given the bankrupts—the endorsers, the claims would have then been proved; and then there could have been no question but that this was proof of debts, in definite amount, absolutely owing by the bankrupts two months after proceedings began. In this state of facts the trustee certainly would have not been in position to ask for a reconsideration of the claim.

Moreover, in the supposed case, there would have not been payment of a dividend, pending the determination of trustee's objections or petition to reconsider. Such objections were made as to other claims filed with the result that dividends were not paid thereon. But such was not the case as to the claims here being litigated. Proof was made. These claims, long ago, were allowed. No objections were offered. No exceptions were taken. The debts were fixed liabilities owing just two months after the proceedings commenced—if in fact not such when proceedings started. A dividend was paid without objection. A year passed without objection, and without petition, and now after two years have passed since the beginning of proceedings, twenty-one months after the maturity of the notes (which definitely fixed the liabilities of the endorsers, the bankrupts) eighteen months after the claimants have received part payment of their claims, comes the trustee to object. We say the objections are too late. We vigorously urge that

laches bars trustee's right to have this claim reconsidered.

Our conclusions as to this are amply supported by the best text-writers on the subject.

Mr. Loveland, quoting from Hinchel Brewing Company, 123 Fed. 942, says:

> "A trustee has been held to be barred by laches to petition for a re-examination of a claim once allowed."—Loveland, 3rd Ed., p. 410.

Mr. Collier says:

> "The application for reconsideration must be made promptly or it will be denied because of laches. The time for filing petition may be fixed by rule of the district court, which may authorize an extension of the time for good cause shown, or, if not so fixed, objections after allowance should be made within the year within which an amended proof of claim might have been filed."—Collier, Vol. 2, sec. 57 (p. 1173)

Mr. Remington says: "Reconsideration of an allowed claim will be refused when the trustee is guilty of laches" (Remington, Vol. 2, sec. 1042; p. 407). And in the supplement, November, 1925, to this volume of Remington is found excerpts from the opinion of the Circuit Court of Appeals for the Eighth Circuit, in Blanke Man. & Sup. Co. *v.* Winnifield L. & I. Co. (290 Fed. 180), which reads as follows:

> "To assure control and equitable disposition of claims, sec. 57K of the Bankruptcy Act

(Comp. Stat. 1916, sec. 9641) provides that 'claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed.' This provision, obviously, was not intended to give immediate right to such reconsideration. Not only does it expressly state that such reconsideration 'may' be allowed 'for cause'; but to hold the right as absolute would be to nullify the provision in sec. 25a of the Act. (Comp. Stat. sec. 9609), which requires appeals from orders of confirmation to be taken within ten days. Also, such a view of sec. 57K would tend to delay (through repeated petitions for reconsideration and appeals therefrom) the speedy distribution of the estate which is one of the prime purposes of the Bankruptcy Law (Wiswall *v.* Campbell, 93 U. S. 347, 350, 23 L. ed. 923, 924). Therefore, we construe sec. 57K as submitting the matter of allowing reconsideration *to the sound discretion of the court.*''

There is an additional strong equity which makes even clearer the laches of the trustee as to the one note in No. 5457 and one of the three notes in No. 5458.

As shown by the record, after one year had elapsed after the filing of the petitions in bankruptcy by the bankrupts the claimant in No. 5457, and as to one of their three notes (that maturing October 3, 1926, fourteen months after petitions filed) the claimants in No. 5458, did not withdraw these notes, present them for payment, have them protested for nonpayment and

have notices of dishonor given these bankrupt endorsers. This was not done for the reason claimants believed, in fact thought they knew, if objection or motion to reconsider was to be made it must be made within twelve months—the time then allowed for proving claims—and within which time Mr. Collier says objections after allowance should be made.

The claimants in No. 5458 had protested the note maturing two months after petition filed, and then, after these petitions to reconsider were filed, duly protested the note maturing twenty-six months after bankruptcy petitions were filed.

This omission, for the reasons stated, to protest these two notes and thereby render the endorsers liable after their discharge, if in fact they are not provable against the bankrupts' estates, is another strong equity intervening to cause the unprecedented delay in the trustee to amount to laches in moving for reconsideration of the claims. If the notes are not provable in bankruptcy they are not barred by the bankruptcy and, but for this laches of the trustee in objecting, would have been protested and the bankrupts held liable therefor after their discharge. There was no protest. Therefore, the bankrupts after their discharge are not liable, and now to hold the notes nonprovable debts is to say finally to the claimants, the notes may not be collected, in whole or in part, either from the estate of the bankrupts before or after their discharge. Here is the delay that works a disadvantage and prejudices the rights of the claimants, resulting in a changed condition of the parties to which

they cannot be restored. The delay is inequitable and estops the trustee, according to Mr. Pomeroy, Sec. 1442, hereinbefore quoted.

All the equities loudly call for estoppel against the attempted assertion of the right, to re-examination and rejection, made by the trustee, in all four of these cases, but most loudly for the additional reason herein stated, as to these two notes, one each in Nos. 5457 and 5458.

POINT F.

In the Rutherford Case in addition to all the other grounds, including laches and inexcusable delay, set out in points A to E, inclusive, is the additional ground of res judicata.

There are facts and circumstances peculiar to the claim of Dr. A. G. Rutherford which give rise to two additional defenses in his behalf herein, and that is to say, and equitable defense, arising from certain facts and circumstances, and the plea of *res judicata*.

The facts and circumstances, briefly stated, are:

Rutherford filed his sworn proof of claim embracing there two items, consisting of:

(*a*) A note for $15,000.00, dated September 25, 1924, payable to the order of W. P. T. Varney, signed by Pricy A. Varney and endorsed by Nancy Jane Varney, W. P. T. Varney, and J. M. Pinson. This note represents the indebtedness involved in this controversy.

(*b*) A note for $38,000.00, dated March 26, 1925, made by W. P. T. Varney and endorsed

by Pricy A. Varney and Nancy Jane Varney, payable to Dr. A. G. Rutherford.

Both notes were embraced in the one sworn proof of claim, for a total of $53,000.00. There being no objection thereto, the claim, in its entirely, was allowed. On September 19, 1925, the trustee filed objections and petition to expunge the item of $38,000.00 from the claim of Rutherford. On January 21, 1926, the trustee filed further amendatory objections to the item of $38,000.00. This gave rise to an issue of law and fact involving Dr. Rutherford in much labor and expense.

Depositions were taken, pro and con, and a large record made up. The matter being argued, the referee, on the 30th day of April, 1926, ruled with the trustee and expunged the item of $38,000.00. Rutherford then took the matter before the district court, where extended arguments, oral and on belief, were made. The district judge having heard and considered the matter, on November 3, 1926, approved and confirmed the order entered by the referee. On November 6, 1926, upon assignments of error an appeal was granted from the judgment of the district court and the case was thereupon taken to the Circuit Court of Appeals, and there decided against Rutherford.

In relation to the foregoing litigation, Dr. Rutherford was necessarily involved in much time and expense, his expenditures including costs of travel, court costs, printing, counsel fees, and the like, including loss of time and worry.

The trustee having thus successfully eliminated from Rutherford's claim the item of $38,000.00, and encouraged by the decision of the Circuit Court of Appeals rendered in First National Bank of Pikeville *v.* Elliott, supra, did, on July 25, 1927, file his petition and move to reexamine and expunge the item of $15,000.00, remaining in the proof of claim.

This claimant filed an answer to the proceedings, wherein he set forth the facts and made argument to the effect:

(*a*) That the note was the basis for a provable claim because it fell due on September 24, 1925, seven weeks after petition in bankruptcy was filed.

(*b*) That it would be grossly inequitable, after the expiration of the time within which claims might be proven, to reconsider the allowance of the claim under Section 57K of the Act of May 27, 1926, no proper cause or good reason, or equities, for such action appearing.

(*c*) That the conduct of the trustee by remaining silent and failing to move for a period of two years after the claim was proven and allowed, and the time for filing an amended or new proof of loss had expired, was contrary to the rules of equity and the dictates of natural justice.

(*d*) That the delay of the trustee had prejudiced the rights of the claimant, and his petition is barred by lapse of time (laches).

(*e*) That the note in question is in legal effect the joint note of the three Varneys, Nancy Jane, Pricy A., and W. P. T. that the liability of each of them was fixed and definite, and in nowise contingent or unliquidated at the time of the filing of the proof of loss.

(*f*) That Pricy A. Varney and Nancy Jane Varney were adjudged bankrupts simultaneously, and W. P. T. Varney, the payee of the note, before said petitions were filed was notoriously and hopelessly insolvent and bankrupt, which was known to Pricy A. Varney and Nancy Jane Varney; that, therefore, the note was, in fact, at the time of the filing of the petition, a fixed liability absolutely owing.

(*g*) That petitioners' objection against the claim because the liability on the endorsement did not mature until one month after the adjudication, was without merit for the reason that it became a fixed liability on its due date, within a year after bankruptcy.

(*h*) Because of the knowledge of the bankruptcy and the inability of the payee of the note to pay one per cent of his liabilities, the bankrupts knew at the time their petitions were filed that they would be required to pay, in so far as their assets would go, said note, it was therefore a fixed liability absolutely owing.

(*i*) That the trustee had filed exceptions to and petition to expunge the claim based on the

$38,000.00 note, and had filed none on the $15,000.00 note; that this lulled the claimant to security, and if this had not been done, he would have filed an amended or new proof of claim as to the $15,000.00 note.

(*j*) By an amended answer, Rutherford further pleaded:

A. That the long delay—of nearly two years—was and is prejudicial, and therefore inequitable to him, for the reason that he was and has been deprived of his opportunity to bring an action against the said bankrupts in their individual capacity, and thereby to have secured an early judgment as against them, and a priority of lien over such property as they may have acquired since their adjudication in bankruptcy; provided, as of course, that the petitioner's proposition of law to the effect that the claim was not provable, be well taken in law which position of the said trustee the said Rutherford says is not sound.

B. That it would be prejudicial, and therefore inequitable, to allow a reexamination of the claim for $15,000.00 at this late day for the reason that it would involve the said Rutherford in double expense and cost in relation to what would be practically two separate proceedings—the case involving the note of said Rutherford for $38,000.00 being now already in the Circuit Court of Appeals.

The answer further set forth in much detail, as will appear from the printed record (in No. 5459, page 8, *et seq.*) the facts and circumstances incidental to the litigation in both cases.

Rutherford thereupon filed an amended proof of claim, protest duly made, with copy of the note and certificate of protest, and it was stipulated between counsel that the $15,000.00 note was protested in proper time and in due form.

It was also stipulated before the referee that Nancy Jane Varney at the date of adjudication in bankruptcy had personal knowledge of the insolvency of the maker and all endorsers of the note in question, and that nothing could be realized by the claimant then or since from any obligor, except such payment as might be obtained through dividends from the estate of the maker, Pricy A. Varney.

The matter was submitted on the petition, answer and stipulation with the result that the referee held with Rutherford by refusing to grant the petition and motion of the trustee to reexamine and expunge the claim; thereupon the trustee filed petition for review and took the case before the district court.

The matter having been thoroughly argued on briefs and orally before Judge Cochran, the latter, on June 4, 1929, pronounced and entered judgment affirming the action of the referee and confirming the order entered by the latter as of December 17, 1927.

Whereupon the trustee prosecuted an appeal to the Circuit Court of Appeals.

Upon this record, in relation to Rutherford's case there arises three questions of law. We contend as follows:

First. That according to the letter and spirit of the Act of Bankruptcy, the claim, being provable, was properly allowed under the rule established in the Moch case, and numerous other decisions in harmony with the ruling in the Moch case, and as supported by the views of eminent text-writers on the subject of the laws appertaining to bankruptcy.

Second. That the facts and circumstances, attending the procedure in relation to the note of $38,000.00 gave rise to an equity in favor of this claimant. Such equity forbids the reopening of the matter. Section 57K of the Bankruptcy Act provides as follows: "Claims which have been allowed *may be reconsidered* for cause and reallowed, or refused in whole or in part *according to the equities of the case,* before but not after the estate has been closed." The trustee slept for nearly two years on his rights, and during the meanwhile paid a dividend of ten per cent on the claim. The fact that such dividend was paid did not alter the case, except for the fact that it shows an acquiesence in the former action of the referee in allowing the claim. No objection had been interposed to that item. If it had been stricken out as a nonprovable claim, Rutherford could have proceeded to judgment and thereby secured an early priority as against any estate of the bankrupts which might remain after payment

of the debts, or estate which the bankrupts might thereafter acquire. The main fundamental grounds which forbade the referee from reexamining the claim lay in the fact that both items should have been attacked at the same time, and thereby have admitted of the questions being settled as to both notes in the same litigation. By such delay the trustee has involved Rutherford in double trouble and expense. It is unreasonable and unjust to the claimant and equity would seem to forbid such action upon the part of the trustee. There was no stipulation, express or implied, to the effect that the procedure as to the $15,000.00 note should be held in abeyance awaiting action of the courts in relation to the case of the Bank *v.* Elliott. It was never suspected by Rutherford or his counsel that the law enunciated in the Moch case would ever be challenged. The use of the words "may be reconsidered" and "according to the equities of the case" incorporation in Section 57K, clearly invests the referee with a certain discretionary power, and the fact that in this case the referee exercised it favorably to the plaintiff is to his credit, and the action of the district judge in approving and confirming the action of the referee, in respect to that ruling, was fully justified, and, under the circumstances, could not have been otherwise under the law. *In re* Eldorado Ice & Coal Co., 290 F. 180.

The Circuit Court of Appeals for the Third Circuit in the case last cited, after quoting from the provision of the pertinent statute, said:

> "This provision, obviously, was not intended to give an undeniable right to such reconsidera-

tion. Not only does it expressly state that such reconsideration "*may*" be allowed "for cause", but to hold the right as absolute would be to nullify the provision in section 25a of the act (Comp. Stat. sec. 9609a), which requires appeals from orders of confirmation to be taken within ten days. Also, such a view of section 57k would tend to delay (through repeated petitions for reconsideration and appeals therefrom) the speedy distribution of the estate which is one of the prime purposes of the Bankruptcy Law (Wiswall *v.* Campbell, 93 U. S. 347, 350, 23 L. Ed. 923). Therefore, we construe section 57k as submitting the matter of allowing reconsideration to the sound discretion of the court."

Third. The doctrine of *res judicata* applies to this case with all its force. The judgment in the former case concludes the parties, not alone to what was therein involved, but, also as to such other matters and things as might have been adjudicated therein. Equity does not take two bites at a cherry. The rules of the law of bankruptcy are analagous to those appertaining to equity. Let us suppose the case of a vendor of real property bringing a suit to enforce the collection of two notes given for purchase money, and the defendant by answer setting up a defense as to one of the notes, and, finally, after review in an appellate jurisdiction sustaining that defense—in that case—would that defendant, after the cause had been remanded be allowed to file an amended answer and to contest the validity of the other note? Other sup-

posed cases of a similar nature will immediately occur to the mind of the court.

What was said under Point E applies here with the same force and effect as to the laches or unequitable delay.

As to the claim here made the prayer of the trustee's petition to reconsider and expunge the Rutherford claim should be denied because of the fact the trustee had already once attacked this claim (as to the note for $38,000.00) and litigated this, by successive steps, to a final determination in favor of the trustee, we cite the cases set out in the summary of the argument under this point (F).

The case of Bates *v.* Bodie, 245 U. S. 520, decided by this court in 1918, is illustrative of the principle involved and of its application. Therein the court says:

> "And this court has established a test of the thing adjudged and the extent of its estoppel. It is: If the second action is upon the same claim or demand as that in which the judgment pleaded was rendered, the judgment is an absolute bar not only of what was decided, but of what might have been decided."

Bear in mind that what was there litigated was a portion of this same identical claim—Rutherford's debt comprising two notes, one for $38,000.00 which was there litigated and one for $15,000.00 attacked herein.

What the court said in Bates *v.* Bodie it has been saying for years, as is illustrated by the following from

Virginia-Carolina Chemical Co. *v.* Kirven, 215 U. S. 252:

> "It is established that the bar of a judgment in another action for the same claim or demand between the same parties extends to not only what was pleaded or litigated in the first action, but what might have been pleaded or litigated. If the second action is upon a different claim or demand, the bar of the judgment is limited to that which was actually litigated and determined. Cromwell *v.* Sac County, 94 U. S. 351, 24 L. ed. 195; Northern P. R. Co. *v.* Slaght, 205 U. S. 122, 51 L. ed. 738, 27 Sup. Ct. Rep. 442."

Conclusion.

The construction and interpretation given the statute by the Circuit Court of Appeals operates to defeat the benign purpose of the Bankruptcy Act, in this: It turns away empty-handed one class of creditors to the distinct advantage of another class. The decision of the court below, if it be the law, also operates an injustice upon the bankrupt. Seldom it is, that a bankrupt is not an accommodation endorser of negotiable paper which does not mature until after petition has been filed. If possible, the court should give a statute that construction which will best carry out the primary intent and purpose of the legislative body, and to the end that the statute may operate equitably upon all parties concerned.

For these considerations, and the need of uniformity in the decisions of the several Circuit Court of Appeals, on the law of bankruptcy, we respectfully insist

that the writs, here prayed for, should issue and that upon final hearing the judgments of the Circuit Court of Appeals for the Sixth Circuit should be reversed, and those of the district court be affirmed.

Respectfully submitted,

RANDOLPH BIAS,
Counsel for Petitioners in all four cases.

RANDOLPH BIAS,
WELLS GOODYKOONTZ,
Counsel for Petitioner in Elliott, Trustee, v. Rutherford.

WILLIAMSON, WEST VIRGINIA, *June* 16, 1930.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930.

No. 239.

ALVIS MAYNARD, ADMINISTRATOR OF MARY A. RONAN, DECEASED, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

No. 240.

JOHN B. VARNEY, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

No. 241.

J. M. SMITH AND A. B. SCOTT, PETITIONERS,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY AND PRICY A. VARNEY, RESPONDENT.

No. 242.

A. G. RUTHERFORD, PETITIONER,

vs.

W. K. ELLIOTT, TRUSTEE IN BANKRUPTCY OF NANCY JANE VARNEY, RESPONDENT.

PETITIONERS' REPLY BRIEF.

RANDOLPH BIAS,
Counsel for Petitioners.
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Associate Counsel for Petitioner A. G. Rutherford.
GOODYKOONTZ & SLAVEN,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1930

No. 239.

ALVIS MAYNARD, ADMINISTRATOR OF MARY A. RONAN, DECEASED, PETITIONER,

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PETITIONERS' REPLY BRIEF.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

In this brief we shall follow the subject titles adopted by the Respondent rather than adhere to the arrangement in the brief tendered with the Petition.

Much of the argument in Respondents' brief we anticipated in our first brief, and, therefore, there is no reason why, in this Reply, the same should be repeated. There are, however, certain features of counsels' argument which call for reply and certain additional matters which we shall bring to the Court's attention.

I.

Provability of Claim Arising Upon Bankrupts' Endorsement of Unmatured Negotiable Note.

Under this heading it is asserted that the claim is a contingent one, for the reason that there is not endorsed upon the note any waiver of protest, and that, *although the maker be bankrupt,* with no estate, *the holder may not cause the note to be protested,* in which event the endorser would be released or discharged, and, consequently, the note is non-provable. On the contrary, we assert, that the undertaking is an express contract, in writing; that its terms are certain, definite and fixed; that it is a commercial contract entered into prior to the filing of the bankrupts' petition; that the name of the endorser signifies his intention to pay; that the holder, if he choose, may bring action, in case of default, against the endorser alone; that the extent of the endorser's liability is at all times known, for it is measured by the note itself; that the endorser's liability constitutes a *provable debt,* although default has not been made by the principal; that the note constitutes a *demand or claim,* even if not a debt, within the purview of the Act. As for the contention that the note may never be protested, therefore that liability is contingent, we reply that that contention will not hold

good. It is true that the holder might neglect to cause protest, and thereby release or discharge the endorser, but until such act of omission occur the status of the endorser is one of liability. One had just as well say that all notes import a contingent liability, even as regards the maker. For example, the note might be allowed to expire under the Statutes of Limitation, and the right of recovery barred; or, *reductio ad absurdum*, that an alien enemy might overthrow this Government and decree the abrogation of all contracts. The argument of counsel, for whom we have great respect, we believe not to be sound. That argument is based, largely, upon *Dunbar vs. Dunbar* and *Zavelo vs. Reeves*.

Dunbar vs. Dunbar.

(190 U. S. 340.)

In *Dunbar vs. Dunbar*, the facts were that a husband entered into a contract with his wife to pay unto her alimony for life or for so long as she remained unmarried. This Court in substance held, that perhaps the annuity would be provable, but that the impossibility of ascertaining for how long the woman would remain single was beyond human computation, and, therefore, that the claim was not susceptible of proof. For a further discussion, see our original brief, page 22.

Zavelo vs. Reeves.

(227 U. S. 625.)

In *Zavelo vs. Reeves*, very much relied upon by counsel, the facts are that Zavelo on November 22, 1905, filed his petition in bankruptcy in the Northern District

of Alabama and was duly adjudged a bankrupt. On January 1st (observe that it was five weeks *after* the petition was filed and after adjudication, but before discharge) Zavelo promised Reeves that if he would lend him five hundred dollars with which to make composition with his creditors, he, Zavelo, would repay the sum to Reeves. In other words, the bankrupt was borrowing money from one of his creditors to make composition with all of his creditors, and made this arrangement *after* his petition in bankruptcy was filed. It was this fact, and only this fact, which caused Mr. Justice Pitney, speaking for the Supreme Court, to say:

> "Debts founded upon open account or upon contract, express or implied, which are provable under the Bankruptcy Act of 1898, include only such as existed at the time of the filing of the petition in bankruptcy."

In the case cited the debt was non-existent at the time the Bankrupt filed his petition. The allowance of his claim would have been contrary to the terms of the Act.

The forms for proof, prescribed by this Honorable Court, namely, Nos. 54, 55, 56 and 57, recite that the bankrupt "*was at and before the filing of said petition and still is, justly and truly indebted to said deponent*", etc. The language quoted varies slightly where the claimant is a copartnership or a corporation. We respectfully insist that the Zavelo decision plainly is not applicable to the pending cases. We say that the quotation from the opinion, page 13, Respondents' Brief, when analyzed, shows that, although Clause 4 of Sec-

tion 63 does not carry the phrase—incorporated in Clause 1, of the section, reading thus—"*absolutely owing at the time of the filing of the petition* against him," yet that the intention of the law-making body appears from a reading of the entire section and, consequently, the court held that "Clause 4 describes simply debts that are 'founded upon an open account, or upon a contract, express of implied', *not in terms referring to the time of the inception of the indebtedness.*"

And then follows this language: "But reading the whole of Section 63, and considering it in connection *with the spirit and purpose* of the Act, we deem it plain that the debts based on open accounts *or upon contract, express or implied,* that are provable under Section 63-*a*, clause 4, include only such *as existed at the time of the petition in bankruptcy.*"

The fact that this Court, in construing the act according to its "spirit and purpose", read into the clause certain language—which appeared elsewhere in the section—does not imply that Clause 4 is nugatory as concerns the provability of debts based upon contract.

Counsel have not offered any sufficient reason why Clause 1 should be deemed paramount to Clause 4. Evidently, the object of Congress was to make provable all classes of debts, that are inherently capable of proof. It is true that Congress could not mould legislation to fit the claim of alimony, contingent upon the non-marriage of a woman, as in *Dunbar vs. Dunbar.* Furthermore, Congress has provided even a method

for the ascertainment and proof of claims, theretofore unliquidated. *Vide*: Sec. 63*b*.

Williams vs. United States Fidelity and Guaranty Co.

(236 U. S. 549.)

The captioned case is cited in our original brief as supporting jurisdiction, but it is also an authority in behalf of the Petitioners on the main proposition, namely, that the claims are provable. The facts in the Williams case are, as appears from the opinion of Mr. Justice McReynolds, as follows: Williams and his partner gave to the surety company their personal bond to indemnify it against loss because of its becoming their surety. Williams and his partner breached the contract and thereafter Williams went into bankruptcy. Despite the breach, and resultant debt, the surety failed to prove its debt in the bankruptcy proceeding. Later the surety sued the bankrupt for the money it had been required to pay as surety. Naturally the court held the surety company could not recover but was estopped by the bankruptcy of Williams in that it had failed to prove a provable debt against the bankrupt when his estate was being administered in bankruptcy. Mr. Justice McReynolds, writing the opinion for the court, said:

> "It would be contrary to the basal spirit of the bankrupt law to permit a surety, by simply postponing compliance with his own promise in respect of a liability until after bankruptcy, to preserve a right of recovery over against his principal, notwithstanding the discharge would have extinguished this if the surety had

promptly performed as he agreed. Such an interpretation would effectually defeat a fundamental purpose of the enactment."

Earlier in the opinion it is said:

"Counsel for the company 'contend that the claim at bar was subject to two contingencies, one of which, to wit, the sustaining or incurring of actual pecuniary loss, resultant to the principal's act, had not arisen at the time of the filing of the petition. Therefore said claim was not an unliquidated claim upon an express contract absolutely owing at the time. It was a contingent claim, and as such not provable, and therefore not affected by the bankrupt principal's discharge.'

"If the doctrine announced by the court below and maintained here by counsel is correct, a discharge in bankruptcy may have very small value for the luckless debtor who has faithfully tried to secure his creditors against loss; and, in effect, a demand against him may be kept alive indefinitely, according to the interest or caprice of his surety.

"It is the purpose of the bankrupt act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness, and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes."

See also Thiesen v. Vierell Bank etc. 206 N.S. p 28.

It seems to us that the Williams' case effectually disposes of the contention of the respondents.

Counsel, also, cite and rely upon a recent case: *In re Adair Real Estate and Trust Co.* (D. C. Ga.), 35 F. (2) 531. Counsel says that the case of *Elliott vs. The*

First National Bank, decided by the Circuit Court of Appeals for the Sixth Circuit, was cited with approval in the Adair case. An examination of the Adair case will show that the claims of Neuman and others were held provable. The bankrupt was a guarantor of an issue of bonds. It is true that the court cites the case of the *First National Bank vs. Elliott* and other cases offered to sustain the proposition of non-provability, but the court rested the decision on other authorities, including the Williams case, above mentioned.

II.

Provability of Claims Based on Bankrupts' Endorsement of Negotiable Instruments Maturing More Than One Year After Adjudication.

Under this caption counsel for respondent attack the "provability" of two of the items, namely:

(*a*) John B. Varney note of $3,000.00, matured October 3, 1926.

(*b*) Smith and Scott, 2 notes, $2,400.00 each, matured October 3, 1926 and 1927, respectively.

In support of respondent's objection to the allowance of these items counsel quote the provision of the act which reads thus: "Claims shall not be proved against a bankrupt estate, subsequent to one year after the adjudication." Our answer is, that the record shows that proof of the claims was filed well within the time limit of one year. That of John B. Varney was filed on August 18, 1925 (R. p. 9); that of Smith and Scott was likewise filed on August 18, 1925 (R. p. 15). The date of the filing of the Petitions, in Bank-

ruptcy, is not shown, but the adjudication took place on August 3, 1925. The proofs (in all four cases) were filed at the first meeting of the creditors, held fifteen days after adjudication. Our search has failed to reveal any statute other than the one mentioned or decision purporting to limit the right of proving a debt, the terms of which were definite and fixed, not due at the time of the filing of the petition or maturing beyond one year after the adjudication.

Collier says:

> "In addition to claims upon which actions could be brought, *debts existing at the time of the filing of the petition but not then payable are provable* in bankruptcy, and being provable the holder of such debts may be a petitioner to have the debtor involuntarily adjudged a bankrupt."

The theory, of respondents' counsel, that a debt may not be proved until after it falls due, and that if it mature more than one year after adjudication it cannot be proven at all, we believe, cannot be upheld.

III.

Laches.

Vide: Opinion, pp. 29-30.
Our original brief, p. 25 *et seq.*

IV.

Effect of Former Petition to Re-examine.

The Rutherford Claim. Case No. 242.

Vide: Agreed Statement of Record on Appeal, R. pp. 21-26. Opinion, pp. 29-30. Our original Brief, R., p. 35 *et seq.*

The Referee, having considered "the equities of the case", refused the petition to re-examine. The District Court affirmed him, but the Circuit Court reversed, regardless of the views of the Referee and District Court.

El Dorado Ice & Coal Co.

(290 Fed. 180.)

The Circuit Court of Appeals, Eighth Circuit, in the opinion written for the court by Circuit Judge Stone, said, p. 181:

> "This petition for reconsideration was filed after the time had expired for appealing from the order confirming allowance of the claim. To assure control and equitable disposition of claims, section 57k of the Bankruptcy Act (Comp. Stat. Sec. 9641k) provides that:
>
> "'Claims which have been allowed *may be reconsidered for cause* and reallowed or rejected in whole or in part, *according to the equities of the case,* before but not after the estate has been closed.'
>
> "This provision, obviously, was not intended to give an undeniable right to such reconsideration. Not only does it expressly state that such reconsideration *'may' be allowed 'for cause',* but to hold the right as absolute *would be to nullify the provision in section 25a* of the act (Comp. Stat. Sec. 9609a), which requires appeals from orders of confirmation to be taken within ten days. Also, such a view of section 57k *would tend to delay (through repeated petitions for reconsideration and appeals therefrom)* the speedy distribution of the estate

which is one of the prime purposes of the Bankruptcy Law (Wiswall v. Campbell, 93 U. S. 347, 350, 23 L. Ed. 923). Therefore, we construe section 57k as submitting the matter of allowing reconsideration *to the sound discretion of the court. Without here deciding that the exercise of such discretion can be reviewed,* where the court declines to reconsider the allowance but treating, for the purposes of this case, the right of such appeal to exist, we turn to a consideration of whether that discretion was erroneously exercised here. So far as the petition for reconsideration involves questions of law, such were presented to the referee and court upon the allowance of the claim. *If the appellant was dissatisfied with the determination of them at that time he should have appealed* therefrom and not delayed distribution."

The action of the Circuit Court, in reversing Judge Cochran on this point, is palpable error, as the Petition for the Writ of Certiorari distinctly points out. Furthermore, the Circuit Court "has decided an important question of Federal law which has not been, but should be, settled by this court." Supreme Court Rules, 34, Sec. 4, Par. (*b*).

The Court, deciding the El Dorado case, even questions the right to have reviewed the action of the *nisi prius* court in declining to reconsider the allowance of a claim.

V.

Additional Strong Equities Pertaining to 240 and 241.

As shown by the record, after one year had elapsed after the filing of the petitions in bankruptcy by the

bankrupts the claimant in No. 240 and as to one of their three notes (that maturing October 3, 1926—fourteen months after petitions filed) in No. 241, did not withdraw these notes, present them for payment, have them protested for non-payment, and have notices of dishonor given these bankrupt endorsers. This was not done for the reason claimants believed, in fact, thought they knew, if objection or motion to reconsider was to be made it must be made within twelve months—the time then allowed for proving claims—and within which time Mr. Collier says objections after allowance should be made.

The claimants in No. 241 had protested the note maturing two months after petition filed, and then, after these petitions to reconsider were filed, had duly protested the note maturing twenty-six months after bankruptcy petitions were filed.

This omission, for the reasons stated, to protest these two notes and thereby render the endorsers liable after their discharge, if in fact they are not provable against the bankrupts' estates, is another strong equity intervening to cause the unprecedented delay in the trustee to amount to laches in moving for reconsideration of the claims. If the notes are not provable in bankruptcy they are not barred by the bankruptcy, and, but for this laches of the trustee in objecting, would have been protested and the bankrupts held liable therefor after their discharge. There was no protest. Therefore, the bankrupts after their discharge are not liable, and now to hold the notes nonprovable debts is to say finally to the claimants, the notes may not be collected, in whole or in part, either

from the estate of the bankrupts before or after their discharge. Here is the delay that works a disadvantage and prejudices the rights of the claimants, resulting in a changed condition of the parties to which they cannot be restored. The delay is inequitable and estops the trustee, according to Mr. Pomeroy, Section 1442.

All the equities loudly call for estoppel against the attempted assertion of the right, to reexamination and rejection, made by the trustee, in all four of these cases, but most loudly for the additional reason herein stated, as to these two notes, one each in Nos. 240 and 241.

Respectfully submitted,

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 239.

ALVIS MAYNARD, Administrator of Mary A. Ronan, Deceased, *Petitioner,*

vs.

W. K. ELLIOTT, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney, *Respondent.*

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JOHN B. VARNEY, *Petitioner,*

vs.

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No. 241.

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MEMORANDUM BRIEF FOR RESPONDENT ON PETITION FOR CERTIORARI.

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TABLES OF CASES.

Adams vs. Adams, 25 Minn. 72.
Baltimore Steamship Co. vs. Phillips, 274 U. S. 316.
Bankruptcy Act, Section 1 (11).
Bankruptcy Act, Section 57 (k).
Bankruptcy Act, Section 57 (1).
Bankruptcy Act, Section 63 (a) and (b).
Canton Iron & Steel Co., 197 Fed. 767.
Cromwell vs. County of Sac, 94 U. S. 351.
Dunbar vs. Dunbar, 190 U. S. 340.
First National Bank vs. Elliott, 19 Fed. (2), 426.
General Orders in Bankruptcy No. 21, Sec. 6.
Globe Laundry Co., 198 Fed. 365.
Independent Harvester Co. vs. Tinsman, 253 Fed. 935.
Jacobson vs. Miller, 41 Mich. 90.
Re Star Spring Bed Co., 265 Fed. 137.
Zabelo vs. Reeves, 227 U. S. 625.

BRIEF OF ARGUMENT.

I.

The Bankrupt's Endorsement of a Note Not Due at the Time of the Filing of the Petition in Bankruptcy Cannot Be the Basis of a Provable Debt.

Bankruptcy Act, Section 1 (11):

> "'debt' shall include any debt, demand, or claim provable in bankruptcy;"

Bankruptcy Act, Section 63 (a) and (b):

> "(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; (2) due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied, and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less costs incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgment.
>
> "(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liq-

uidated in such manner as it shall direct and may thereafter be proved and allowed against his estate."

Dunbar vs. Dunbar, 190 U. S. 340;
Zabelo vs. Reeves, 227 U. S. 625;
First National Bank vs. Elliott, 19 Fed. (2), 426.

II.

Claims in Bankruptcy May Be Re-examined up to Closing of Estate.

Bankruptcy Act, 57 (k):

"Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part, according to the equities of the case, before but not after the estate has been closed."

Re Star Spring Bed Co., 265 Fed. 137;
Globe Laundry Co., 198 Fed. 365;
Canton Iron & Steel Co., 197 Fed. 767.

III.

A Claim Already Re-examined in Part May Be Re-examined.

General Orders in Bankruptcy No. 21, Sec. 6:

"When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor. At the time appointed the referee shall take the examination of the cred-

itor, and of any witnesses that may be called by either party, and if it shall appear from such examination that the claim ought to be expunged or diminished, the referee may order accordingly."

Bankruptcy Act, 57 (1):

"Whenever a claim shall have been reconsidered and rejected, in whole or in part, upon which a dividend has been paid, the trustee may recover from the creditor the amount of the dividend received upon the claim if rejected in whole, or the proportional part thereof if rejected only in part."

Baltimore Steamship Co. vs. Phillips, 274 U. S. 316;
Cromwell vs. County of Sac, 94 U. S. 351;
Adams vs. Adams, 25 Minn. 72;
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MEMORANDUM BRIEF FOR RESPONDENT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The respondents respectfully present this their memorandum brief in opposition to the petition for writs of certiorari in the above entitled causes.

Upon page 11 of the petition and brief for petitioners appears their specification of errors. The errors relied upon are divisible into three classes: I, a determination that a note endorsed by a bankrupt and not due when the petition in bankruptcy is filed is not a provable debt against the estate of a bankrupt endorser; II, that a trustee in bankruptcy may at any time before an estate is closed obtain reconsideration of an allowed claim; III, that where a single claim is made upon two separate indebtednesses of a bankrupt, represented by separate notes, that a separate objection may be filed by the trustee, after the expunction of the claim as to one note.

I.

Question of Provability of a Bankrupt's Endorsement of a Note Not Due at the Time of the Filing of a Petition in Bankruptcy.

It is the position of the respondent that the provability of a note endorsed by a bankrupt and not due at the time of the institution of the bankruptcy proceedings, has been in effect determined by the rulings of this Court. It is conceded that there is no decision of this Court known to counsel which explicitly holds that such a claim is not provable.

The Bankruptcy Act, Section 1 (11), defines debts as a provable claim. The Bankruptcy Act, Section 63 (a) and (b) defines what debts are provable. Under sub-division (1) of that Section it is stated that debts may be proven which are "a fixed liability as evidenced by a judgment or an instrument in writing absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest, etc." The fourth sub-division says that a debt may

be proved and allowed which is "founded upon an open account or upon a contract, express or implied." It is clear that the bankrupt's endorsement is not provable under (1). It is equally clear that it is provable under (4) unless the limitations in (1) as to it being a fixed liability and absolutely owing at the time of the filing of the petition are construed as being limitations upon the character of debt which may be proven under (4). It is the position of respondent that this Court has taken the position that the limitations of (1) are to be read into the language of (4). This was the view of the Circuit Court of Appeals for the Sixth Circuit in First National Bank vs. Elliott, 19 Fed. (2) 426.

Two cases of this Court seemed to the Circuit Court conclusive. They were Dunbar vs. Dunbar, 190 U. S. 340, and Zavelo vs. Reeves, 227 U. S. 625. In the Dunbar case, in considering Section 63 (a) on page 349, this Court said, "We do not think that by the use of the language in Section 63 (a) it was intended to permit proof of contingent debts or liabilities or demands, evaluation or estimation of which it was substantially impossible to prove."

In the Zabelo case, after considering the terms of Section 63 (a), this Court said on page 631:

> "But, reading the whole of section 63, and considering it in connection with the spirit and purpose of the act, we deem it plain that the debts founded upon open account or upon contract, express or implied, that are provable under section 63 a (4), include only such as existed at the time of the filing of the petition in bankruptcy. This court in effect adopted that construction when, in promulgating the General Orders and Forms in Bankruptcy, in 1898, under the authority conferred by section 30 (Comp. St. Par. 9614), a form of discharge was prescribed (Forms in Bank-

ruptcy, No. 59), by which it is ordered that the bankrupt 'be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the day of , A. D. , on which day the petition for adjudication was filed him, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.'"

Reasoning from these cases, the Sixth Circuit determined that the bankrupt's endorsement of a note not due at the time of bankruptcy was not provable in this language:

> "In the instant case it was not possible to assess damages as of the date of the institution of bankruptcy proceedings. Then whether or not any obligation would eventuate against bankrupts was subject to an unmatured contingency, namely, whether the maker of the collateral notes would default after maturity. Even this contingency, under the Negotiable Instruments Law ripening liability of the bankrupt indorsers, was dependent, at the time of default and dishonor, and not earlier, upon the formality of notice. Bankruptcy, under the circumstances here, could not work an anticipatory breach of the indorsement contract to the result that a provable debt became established as of the date when proceedings were instituted."

It is, therefore, respectfully suggested by respondent that this Court has determined that sub-division (4) of Section 63 of the Bankruptcy Act is to be limited by sub-division (1).

II.

Time for Re-examination of Claims in Bankruptcy.

The second group of specification of errors relates to the time when a trustee may petition for re-examination of allowed claims.

It is respectfully submitted that this question is closed by the language of the Bankruptcy Act, Section 57 (k). That section reads, "Claims which have been allowed may be reconsidered for cause and re-allowed or rejected, in whole or in part, according to the equities of the case, before but not after the estate has been closed." The Lower Court said in commenting upon this Section, "We find in the record no evidence of injury, prejudice or disadvantage to claimants which would make it inequitable to allow the trustee to file his petition for re-examination."

Re Star Spring Bed Co., 265 Fed. 137;
Globe Laundry Co., 198 Fed. 365;
Canton Iron & Steel Co., 197 Fed. 767.

We do not feel that petitioners in their petition have set up any grounds which would justify this Court in issuing its writs of certiorari upon this point.

III.

Re-examination of a Claim Already Re-examined in Part.

This is specification in error No. 5 on page 12 of the petition and brief of petitioners.

Re-examination is allowed under Clause 6 of General Order 21 and subdivision of Bankruptcy Act, Section 57 (l), both of which are quoted in the brief of argument. The procedure is governed by General Order 21. It will be noted that the proper procedure is by petition for re-examination. This is the first step. That petition, by familiar principles, must state the grounds of the Trustee's cause of action against the claimant. In this proceeding a valid ground for expunction of the $38,000.00 claim was stated, which re-

sulted in its being expunged. Filed with the $38,000.00 claim was another claim for $15,000.00 which is now being attacked. Was the former proceeding an adjudication of the present issue which bars this proceeding?

The decree in the former proceeding was upon a cause of action which stated the invalidity of the claim of $38,000.00 upon a note signed by the bankrupt. The decree sought in this proceeding is upon the validity or invalidity of an entirely separate note endorsed by the bankrupt for $15,000.00. Not only is the cause of action distinct but the grounds for the decree will be based on an utterly different issue. This renders the plea of res judicata ineffectual.

> "The effect of a judgment or decree as res judicata depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar. * * * But if the second case be upon a different cause of action, the prior judgment or decree operates as an estoppel only as to matters actually in issue or points controverted, upon the determination of which the judgment or decree was rendered."—Baltimore S. S. Co. vs. Phillips, 274 U. S. 316.

In Cromwell vs. County of Sac, 94 U. S. 351, it was early held that a suit on bonds and coupons was not res judicata on matters not actually litigated in the former suit, by reason of a decree determining fraud in the issuance of the bonds.

In Adams vs. Adams, 25 Minn. 72, there was a suit to recover on one of a series of notes. The defendant pleaded illegality of consideration. The plaintiff replied with a plea of res judicata on a default judgment on a former note of the series. Held that as con-

sideration need not be alleged, it was not determined by the former suit and there was no estoppel.

In Independent Harvester Co. vs. Tinsman, 253 Fed. 935, the Harvester Company brought a bill to cancel a series of notes for fraud. A judgment was obtained by defendant in a different court on one. The fraud was not pleaded as a defense in this proceeding. The Court held that fraud was not res judicata in the cancellation suit because it was a different cause of action.

In Jacobson vs. Miller, 41 Mich. 90, an opinion by Judge Cooley, it was held that a former suit for an installment of rent, determined in plaintiff's favor, did not support a plea of res judicata to a defense of non est factum, where this defense was not made in the former suit, because the present suit was on a different cause of action.

In this estate a claimant filed his deposition upon two notes to establish his right to a part of the funds administered. This gave rise to two distinct causes of action in the Trustees, one flowing from each note. Each cause of action was the primary right in the Trustee to question the validity of each note as a claim against the estate. It was no more necessary for him to file a petition to expunge both notes at the same time than it was for him to file, at one time and in the same petition, exceptions to all claims filed in the estate. We therefore submit that the plea of res judicata is unavailing against this petition for re-examination of the Rutherford claim.

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied in all four of the above cases.

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CHARLES ELMORE CROPLEY
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1930.

No. 239.

ALVIS MAYNARD, Administrator of Mary A. Ronan, Deceased, *Petitioner,*

vs.

W. K. ELLIOTT, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney, *Respondent.*

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No. 242.

A. G. RUTHERFORD, *Petitioner,*

vs.

W. K. ELLIOTT, Trustee in Bankruptcy of Nancy Jane Varney, *Respondent.*

BRIEF FOR RESPONDENT ON REVIEW OF ABOVE CASES ON CERTIORARI.

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W. K. ELLIOTT, Trustee in Bankruptcy of Nancy Jane Varney, *Respondent.*

BRIEF FOR RESPONDENT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

The respondent respectfully presents this brief on review of the above cases on certiorari.

B.

The report of the opinion delivered in the Circuit Court of Appeals is found printed in Elliott vs. Maynard, 40 F. (2) 17. The District Court handed down no opinion. Its order in number 239 is found in Record page one; its order on number 240 is found in Record page six; its order on number 241 is found in Record page twelve, and its order on number 242 is found in Record page eighteen.

C.

The requirements of paragraph one of rule twelve have been fully complied with in the petition for certiorari.

D.

The statement of facts by petitioners, petition page two et seq., is accepted as accurate as to the facts shown by the record. We disagree with an obiter statement in the ninth category that First National Bank vs. Elliott was "without precedent or parallel."

SUMMARY OF ARGUMENT AND APPLICABLE STATUTES.

I.

Provability of Claims Arising Upon Bankrupts' Endorsement of Unmatured Negotiable Instruments Not Containing Waiver of Protest, Notice or Diligence (page 9).

A.

Such a Liability Is Contingent (page 10).

Dunbar vs. Dunbar, 190 U. S. 340.
In re Munsie, 32 Fed. (2d) 304.

Applicable provisions of Uniform Negotiable Instrument Law:

"66-Endorser without qualification; warrants. Every endorser who endorses without qualification warrants to all subsequent holders in due course: (1) The matters and things mentioned in subdivision one, two and three of the next preceding section; and (2) that the instrument is at the time of his endorsement valid and subsisting.

And, in addition he engages that on due presentment, it shall be accepted or paid, or both, as the case may be, according to its tenor, and that if it be dishonored, and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder, or to any subsequent endorser who may be compelled to pay it."

"70—Presentment. Presentment for payment is not necessary in order to charge the person primarily liable on the instrument; but if the instrument is, by its terms, payable at a special place, and he is able and willing to pay it there at maturity, such ability and willingness are equivalent to a tender of payment upon his part. But except as herein otherwise provided presentment for payment is necessary in order to charge the drawer and endorsers."

"89—Notice of Dishonor. Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each endorser, and any drawer or

endorser to whom such notice is not given is discharged."

"101—Notice to Bankrupt or Insolvent. When a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee."

B.

Contingent Claims Are Not Provable (page 11).

Act of 1841—Section 5:

"And all creditors whose debts are not due and payable until a future day, all annuitants, holders of bottomry and respondentia bonds, holders of policies of insurances, sureties, endorsers, bail, or other persons, having uncertain or contingent demands against such bankrupt shall be permitted to come in and prove such debts or claims under this Act, and shall have a right, when their debts and claims become absolute, to have the same allowed them."

Act of 1867—Section 19:

"If the bankrupt shall be bound as drawer, endorser, surety, bail or guarantor upon any bill, bond, note or any other specialty or contract, or for any debt of another person, and his liability shall not have become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability shall have become fixed, and before the final dividend shall have been declared."

C.

Provable Claims Specified in Act Do Not Include En-

dorsements of Unmatured Paper. Sections 63a (1) and (4) of the Bankruptcy Act Are To Be Read Together (page 12).

Bankruptcy Act, Section 63 (a) and (b):

"(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest. (2) Due as costs taxable against an involuntary bankrupt who was at the time of the filing of the petition against him plaintiff in a cause of action which would pass to the trustee and which the trustee declines to prosecute after notice; (3) founded upon a claim for taxable costs incurred in good faith by a creditor before the filing of the petition in an action to recover a provable debt; (4) founded upon an open account, or upon a contract express or implied, and (5) founded upon provable debts reduced to judgments after the filing of the petition and before the consideration of the bankrupt's application for a discharge, less cost incurred and interest accrued after the filing of the petition and up to the time of the entry of such judgments.

(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct and may thereafter be proved and allowed against his estate."

Dunbar vs. Dunbar, 190 U. S. 340;
Zavelo vs. Reeves, 227 U. S. 625;
In re Burka, 104 Fed. 326;
In re Swift, 112 Fed. 315-321;
In re Adams, 130 Fed. 381;

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First National Bank vs. Elliott, 19 Fed. (2d) 426;
12 Minnesota Law Review, 60;
In re Adair Realty & Trust Co., 35 Fed. (2d) 531;
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In re Inman, 171 Fed. 185.

D.

Discussion of Petitioners' Authorities (page 21).

Moch vs. Market Street National Bank, 107 Fed. 897;
In re Semner Glass Co., 135 Fed. 77;
Colman vs. Withoft, 195 Fed 250;
Cobb vs. Overman, 109 Fed. 65;
Riggin vs. Magwire, 82 U. S. 549;
Martin vs. Cole, 104 U. S. 30;
Dunbar vs. Dunbar, 190 U. S. 340.

II.

Provability of Claims Based on Bankrupts' Endorsement of Negotiable Instruments Maturing More Than One Year After Adjudication (page 24).

Such Claims Not Provable (page 24).

Bankruptcy Act, Section 57-n:

"Claims shall not be proved against a bankrupt estate, subsequent to one year after the adjudication."

Loveland on Bankruptcy, Section 301;
In re Smith, 146 Fed. 923 at 926;

Moch vs. Market Street National Bank, 107 Fed. 897;
Remington on Bankruptcy, 3rd Edition, Section 777;
Jas. Dunlap Carpet Co., 163 Fed. 541;
In re Schechter, 39 Fed. (2d) 18.

III.

Laches.

A. General (page 25).

Delaying of Re-examination Petitions to July 25, 1927, Did Not Amount to Laches (page 25).

Pomeroy on Equity, 4th Edition, 1440, 1441, 1442, et seq.;
Chase vs. Chase, 37 Atl. 804.

B. Laches Regardless of Bankruptcy Act (page 28).

No Disadvantage Accrued to Petitioners Because Petitions Were Not Filed Earlier (page 28).

Remington on Bankruptcy, 3rd Edition, Sec. 888 et seq.
Uniform Negotiable Instrument Law:

"Section 81. When Delay in Making Presentment Is Excused. Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence."

"Section 113. Delay in Giving Notice—How Excused. Delay in giving notice of dishonor is excused when the delay is caused by circumstances

beyond the control of the holder, and not imputable to his default, misconduct or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence."

Litigation Was Pending Over The Identical Questions In Other Claims In The Same Estates (page 30).

Pomeroy on Equity, 4th Edition, Section 1455;
U. S. Mittis Co. vs. Detroit Steel Spring Co., 122 Fed. 863;
Schey vs. Turi, 294 Fed. 679;
Jersey City vs. Central R. Co., 212 Fed. 76;
Jackson Co. vs. Gardner Investment Co., 200 Fed. 113;
Southern Pacific Co. vs. Bogart, 250 U. S. 483.

C. Laches Under Bankruptcy Act (page 32).

Bankruptcy Act Specifically Permits Re-examination At Any Time Before Closing of Estate (page 32).

Bankruptcy Act, Section 57-k:

"Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed."

"Section 57(1)—Whenever a claim shall have been reconsidered and rejected in whole or in part, upon which a dividend has been paid, the Trustee may recover from the creditor the amount of the dividend received upon the claim, if rejected in whole or the proportional part thereof, if rejected only in part."

General Order in Bankruptcy, No. 21, Section 6:

"When the trustee or any creditor shall desire

the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred, for an order for such re-examination, and thereupon the referee shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor, etc."

In re Star Spring Bed Co., 265 Fed. 133;
In re Globe Laundry Company, 198 Fed. 365;
In re Canton Iron & Steel Co., 197 Fed. 767;
In re Huffman Co., 15 Fed. (2) 845;
In re Caladonia Coal Co., 254 Fed. 742.

IV.

Effect of Former Petition to Re-examine (page 34).

There is no res judicata because this is a different cause of action (page 36).

General Orders in Bankruptcy, 21 Sec. 6 supra;
Bankruptcy Act, 57 k supra;
Baltimore S. S. Co. vs. Phillips, 274 U. S. 316;
Cromwell vs. County of Sac, 94 U. S. 351;
Adams vs. Adams, 25 Minn. 72;
Independent Harvester Co. vs. Tinsman, 253 Fed. 935;
Jacobson vs. Miller, 41 Mich. 90.

ARGUMENT.

I.

PROVABILITY OF CLAIMS ARISING UPON BANKRUPTS' ENDORSEMENT OF UNMATURED NEGOTIABLE INSTRUMENTS NOT CONTAINING WAIVERS OF PROTEST, NOTICE OR DILIGENCE.

As shown by the statement of the Cases and the Agreed Statements of Record on Appeal below, all of the claims were based on endorsements by one or both of the bankrupts of the simplest form of negotiable instruments, e.g.:

$2,400.00. Williamson, W. Va.

Three years after date I promise to pay to the order of W. P. T. Varney—Twenty-Four Hundred Dollars, Value received, Negotiable and payable at The Day and Night Bank, Williamson, W. Va., with 6% interest.

FERD H. VARNEY.

Endorsement on reverse, "Pricy A. Varney, Nancy Jane Varney." The endorsers were the bankrupts. None of the notes had matured at the date of the filing of the voluntary petition and adjudication in bankruptcy, both of which events took place August 3rd, 1925.

A.

Such a Liability Is Contingent.

The Uniform Negotiable Instrument Act was at the date of the making of all notes and now is in force in Kentucky and West Virginia. By the provisions of that Act the liability of an endorser arises only upon the event of certain contingencies. The applicable provisions of the Negotiable Instruments Act, uniform in Kentucky and West Virginia, are set out in the Brief of Argument, *supra*. By these provisions, an endorser without qualification undertakes to pay the same, "if it be dishonored, and the necessary proceedings on dishonor be duly taken." When the instrument, as these are, is payable at a special place, it must be so pre-

sented to charge the endorser. Notice of dishonor must be given each endorser and any endorser "to whom such notice is not given is discharged."

A contingent claim has been defined as follows:

> "A contingent claim is one as to which it remains uncertain at the time of the filing of the petition in bankruptcy, whether or not the bankrupt will ever become liable to pay it." In re Munsie, 32 F. (2) 304.

Such an endorsement as we are here considering has been specifically called a contingent liability by this court. Dunbar v. Dunbar, 190 U. S. 340 at 350.

B.

Contingent Claims Not Provable.

As the former Bankruptcy Acts specifically allowed proof of contingent claims, Act of 1841, Sec. 5; Act of 1867, Sec. 19; it is inconceivable that Congress in considering the present act did not give careful consideration to the question of the provability of contingent claims and did not deliberately omit them. In both former Acts, the word "endorsers" appears among the classes permitted to prove. Efforts to secure congressional committee reports which might throw light on the then attitude of Congress have been unavailing. The English Act of 1869, in force in 1898, makes contingent claims provable, Bankruptcy Act, Sec. 31, "Capable of being ascertained by fixed rules, or assessable only by a jury, or as a matter of opinion." It may, therefore, be safely concluded that contingent claims as such are not provable under the present Bankruptcy Act.

C.

Provable Claims Specified in Act Do Not Include Endorsements on Unmatured Paper.

The Bankruptcy Act provides as to just what debts are provable in Section 63, quoted in our Brief of Argument. "Debt" under the Bankruptcy Act is a provable claim, Bankruptcy Act, Sec. 2-c 11. For these claims to be provable, they must come under one of the categories stated in Section 63. It is settled that unliquidated debts, referred to in paragraph b of 63 do not enlarge the class of provable debts. Dunbar v. Dunbar, 190 U. S. 340:

> "This paragraph (b), however, adds nothing to the class of debts which might be proved under paragraph (a) of the same section. Its purpose is to permit an unliquidated claim, coming within the provisions of 63-a, to be liquidated as the court shall direct."

None of the other categories are applicable unless it is the fourth. It is under this that appellees contend their debt is provable. It reads:

> "Founded upon an open account, or upon a contract expressed or implied."

Taken alone this would permit the proof of such endorsements as we have here. It must be read, however, with its context. Section one provides for instruments in writing, such as these and states that they must be "absolutely owing at the time of the filing of the petition." It is probable that four was intended to cover unwritten contracts. At any rate, it has been held by the Supreme Court that all of 63 is to be read

together and that the provisions of one limit four, so that, in all cases, the obligation must be absolutely owing at the time of the petition to be provable. Zavelo v. Reeves, 227 U. S. 625. This case relates to the provability of a claim arising after bankruptcy. Held not provable.

> "For the definition of provable debts, we are referred to section 63, which is set forth in the margin. Of the several classes of liabilities, those in classes 1, 2 and 3 are in terms described as existing at or before the filing of the petition. Clause 5 relates to liabilities founded upon provable debts reduced to judgment after the filing of the petition, etc.; plainly meaning that they arose before its filing. Clause 4 describes simply debts that are 'founded upon an open account, or upon a contract, express or implied,' not in terms referring to the time of the inception of the indebtedness. But reading the whole of Section 63, and considering it in connection with the spirit and purpose of the Act, we deem it plain that the debts based on open account or upon contract, express or implied, that are provable under Section 63-a, clause 4, include only such as existed at the time of the filing of the petition in bankruptcy."

The view above expressed as to clause 4 of Section 63 a is the same that has been generally adopted in the Federal District Courts. In re Burka, 104 Fed. 326; In re Swift, 112 Fed. 315-321; In re Adams, 130 Fed. 381; Colman v. Withoft, 195 Fed. 250, 252, and see In re Roth and Appel, 181 Fed. 667, 673. These cases hold one and four in pari materia.

In re Swift, 112 Fed. 315. Hutchinson v. Dee, Circuit Court of Appeals, First Circuit, December 6, 1901.

In this case the bankrupts were stockbrokers and

the creditor, Dee, was one of their customers. The claim which Dee made was for certain shares of stock which had been bought and held for Dee by the bankrupts, and for which the bankrupts were accountable to Dee less about 25 per cent of the value of such stocks which was the amount Dee still owed them on the stock. In December, 1899, the bankrupts made an assignment for the benefit of creditors, to which assignment Dee never became a party; in April, 1900, the bankrupts filed a petition in bankruptcy. The stocks had increased in value by the time of the petition and the question is whether Dee may make his claim on the value at the time of the assignment or at the time of the petition. The question at issue which is pertinent to our case was the contention that unless the assignment ripened the claim of Dee, it was not ripened in time to become provable.

The Court held:

> When a broker makes a general assignment, or is adjudged a bankrupt, a demand and tender are not necessary to enable the customer to assert a breach of the broker's contract; but, as an assignment may be only a temporary expedient to tide over the broker's difficulties, both parties may unite in regarding it as such, so that the customer may treat the subsequent bankruptcy as the breach, in the absence of any tender of performance by the trustee within a reasonable time, and, thereupon, the customer's damages will be determinable as of the date of the petition in bankruptcy.

In commenting further on provable debts, the court said:

> That part of the present Bankruptcy Act which describes what debts may be proved does not re-

peat at all points the words "owing at the time of the filing of the petition," but it is impossible to consider it other than as though it did thus repeat them.

In re Hutchcraft, 247 Fed. 187, District Court E. D. Kentucky, at Covington, October 10, 1917.

Bankrupt was a director in a bank which had been placed in the hands of the state banking commissioner for liquidation, who had brought two suits against bankrupt and other directors to charge them jointly and severally for misuse of funds of the bank. These suits were pending at the time of the proceedings in bankruptcy; the defendants denying liability. The commissioner filed a claim with the trustee covering the amounts which he was suing for.

Held—The Claims of the commissioner were not provable debts against the bankrupt's estate, either by the commissioner or by the bankrupt's co-directors, because they were not fixed liabilities absolutely owing, but were not only contingent, but the amount of liability, if any, could not be ascertained until final distribution of the assets of the bank.

In regard to provable debts the court cited the case of Colman Co. v. Withoft, 195 Fed. 250, that subdivisions 1 and 4 of Section 63 (a) of the Bankruptcy Act are in *pari materia* and that the words "absolutely owing at the time of the filing of the petition against him" are to be read into subdivision 4. The court also says that the fact that contingent debts are not provable under the Act of 1898 is an inference from the fact that provision was made in the Acts of 1841 and 1867 for contingent debts but such provision was excluded from the Act of 1898.

In re Burka, 104 Fed. 326, District Court E. D. Missouri E. D., October 24, 1900.

This case came before the Court on petition to review the finding of the referee in allowing a claim for legal services unconnected with the bankruptcy proceedings which services were contracted for by the bankrupt after the filing of the petition for adjudication against him, and prior to the actual adjudication.

The Court held that the rights of the creditors of a bankrupt in general relate to the date of the filing of the petition, and a debt not then in existence, although arising before the adjudication cannot be proved against his estate.

In commenting on what are provable debts, the court said:

> "It is observed that all of these classes of provable debts, except the fourth, relate, by express terms of the statute, to such as were in existence at the time of the filing of the petition. The fact that the fourth subdivision contains no words of limitation is considered by claimant's counsel a warrant for his contention that his claim, which is founded on an open account, is provable, notwithstanding the fact that it was not in existence when the petition was filed. It is not apparent why this subdivision is inserted without words of limitation as to the time the claim should have accrued. Especially is this so when there seems to have been a studied effort to insert such words in relation to all the other provable claims. But I cannot construe this omission into a general provision for allowance of demands against the estate of a bankrupt, irrespective of the time when they accrued. If such construction be given to the statute, there would be no limitation even to such claims as existed at the date of the adjudication. The general language would cover any claims that might accrue during the pending of the proceedings, even up to the final discharge. In the absence of express provision to the contrary, I think that

debts provable under the Act must be such as existed at the date of the filing of the petition."

The reasoning of Roth & Appel, 181 Fed. 667, is applicable:

> "But while it is not necessary, in order to reach a decision in this case, to determine whether 63-a (4) is subject to the limitation contained in 63-a (1)—that debts to be provable must be absolutely owing at the time of the filing of petition—we think it the better view that it is so limited. If it is not so limited, the limitations in the first subdivision are practically of no effect. All claims upon instruments in writing not provable under the first clause, because not absolutely owing at the time of the petition, might be proved as claims founded upon a 'contract express or implied' under the fourth clause, if no limitations are attached to the latter. We can not regard this interpretation as tenable. We think that the different clauses of 63-a should not be considered as independent, but should be read together, and that the said limitation in the first clause should be considered as repeated in the fourth clause. This interpretation of the section is supported by authority. Thus In re Swift, 112 Fed. 316, 50 C. C. A. 270, already referred to, the Circuit Court of Appeals for the First Circuit said:
>
> > 'That part of the present bankruptcy act which describes what debts may be proved does not repeat at all points the words "owing at the time of the filing of the petition," but it is impossible to consider it other than as though it did thus repeat them.'"

And In re Adams (D. C.) 130 Fed. 381, the court said:

> "But a creditor can not prove for an indebtedness arising between the filing of the involuntary

petition and adjudication. This appears from the analogy of Section 63-a, (1), (2), (3) and (5), as applied to the interpretation of clause (4). In clauses (1) and (4), for example, the limit of time must be the same, inasmuch as clause (4) includes clause (1), and if clause (4) were less limited in point of time, the limit imposed upon clause (1) would become nugatory.

"For these reasons, we think that the claim of the appellant whether regarded as one for unaccrued rent or for indemnity for loss of rent, was not provable against the bankrupt estate under either Section 63-a(1), or 63-a(4), and was properly expunged by the District Court."

The language of the Elliott case definitely states the position of the Sixth Circuit (First National Bank v. Elliott, 19 F. (2) 426):

"A much stronger line of authority than that following Moch v. Market Street National Bank restricts provable debts, whether coming under subdivision 1 or subdivision 4 of section 63a, to those which were ascertainable at the time of the filing of the petition. In Dunbar v. Dunbar, 190 U. S. 340, 23 S. Ct. 757, 47 L. Ed. 1084, the court, quoting, on page 349 (23 S. Ct. 761), section 63a, and holding that section 63b, providing for liquidation of unliquidated debts, adds nothing to the class of debts which are provable under Section 63a, says (page 350—23 S. Ct. 761): 'We do not think that by the use of the language in Section 63a it was intended to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove.'

"The Court proceeds, then, to note the significant fact that, respecting contingent liabilities, the present law is much more restricted in its provisions than the Bankruptcy Acts of 1841 and 1867 (5 Stat. 440; 14 Stat. 517), which provide expressly

for cases of contingent debts and liabilities contracted by the bankrupt. In Crawford v. Burke, 195 U. S.. 176, 25 S. Ct. 9, 49 L. Ed. 147, and in Grant Shoe Co. v. Laird, 212 U. S. 445, 29 S. Ct. 332, 53 L. Ed. 591, it is held that claims which are based upon a right of action present at the time of, or created by, the filing of the petition, are provable subject to liquidation under Section 63b.

"Finally, the exact question, although not directly involved, was considered by the Supreme Court in Zavelo vs. Reeves, 227 U. S. 625, 33 S. Ct. 365, 57 L. Ed. 676, Ann. Cas. 1914 D, 664. Therein the court, after referring to the terms of Section 63a, said, at page 631 (33 S. Ct. 368): 'But, reading the whole of Section 63, and considering it in connection with the spirit and purpose of the Act, we deem it plain that the debts founded upon open account or upon contract, express or implied, that are provable under Section 63a (4), include only such as existed at the time of the filing of the petition in bankruptcy. This court in effect adopted that construction when, in promulgating the General Orders and Forms in Bankruptcy, in 1898, under the authority conferred by Section 30 (Comp. St. Section 9614), a form of discharge was prescribed (Forms in Bankruptcy, No. 59), by which it is ordered that the bankrupt 'be discharged from all debts and claims which are made provable by said acts against his estate, and which existed on the ..... day of ....., A. D. ....., on which day the petition for adjudication was filed ..... him, excepting such debts as are by law excepted from the operation of a discharge in bankruptcy.' "

The opinion proceeds by citing with approval a series of cases to this effect decided by the lower federal courts, including Colman Co. v. Withoft (C. C. A.), 195 F. 250, 252. * * * *

"In the instant case it was not possible to as-

sess damages as of the date of the institution of bankruptcy proceedings. Then whether or not any obligation would eventuate against bankrupts was subject to an unmatured contingency, namely, whether the maker of the collateral notes would default after maturity. Even this contingency, under the Negotiable Instruments Law ripening liability of the bankrupt indorsers, was dependent, at the time of default and dishonor, and not earlier, upon the formality of notice. Bankruptcy, under the circumstances here, could not work an anticipatory breach of the indorsement contract to the result that a provable debt became established as of the date when proceedings were instituted.

"Aside from cases cited, the doctrine of Moch vs. Market Street National bank, *supra*, is disregarded in the First Circuit (In re Swift, 112 F. 315, 321); in the Second Circuit (In re Roth & Appel, 181 F. 667, 31 L. R. A. (N. S.) 270); in the Fifth Circuit (Atkins vs. Wilcox, 105 F. 595, 598, 53 L. R. A. 118); and in the Eighth Circuit (Watson vs. Merrill, 136 F. 359, 69 L. R. A. 719, Bank vs. Stuppi (C. C. A.), 2 F. (2) 822, and Britton vs. Western Iowa Co. (C. C. A.), 9 F (2) 488, 45 A. L. R. (711). Without referring to either case, this court, in Wells vs. Twenty-First Street Co. (C. C. A.), 12 F. (2) 237, applied the principle of In re Roth and Appel, *supra*, rather than that of Moch vs. Market Street National Bank, *supra*.

"Our conclusion, from the foregoing review of the authorities, is that debts which are provable in bankruptcy within any of the categories of section 63a must be such as are subject to liquidation as of the date of the filing of the petition and which then exist as a fixed liability absolutely owing, whether or not then due and payable. The collateral obligations of the bankrupts, attempted to be proven in this case, do not meet these imperative conditions."

An interesting note on the Elliott case, apparently

inclining to our position, is found in 12 Minn. Law Review 60.

This case has since been cited with approval In re Adair Realty & Trust Co. (D. C. Ga.) 35 F. (2) 531. In the Adair case, the question was as to the provability of certain guaranties which had not become absolute at the date of bankruptcy. It was held they were not provable.

On re-examination of the question by the Sixth Circuit the same conclusion was reached in the instant case.

In Bibb Manufacturing Co. vs. Pope (D. C.-N. Y.) 22 F. (2) 557, Judge Augustus Hand writing, the court held that a guarantee of a bankrupt of monthly installments of indebtedness of a third party was not the basis of a favorable claim because contingent. Merrill vs. Baker, 186 Fed. 313 was a similar case. In re Inman, 171 Fed. 185, the same reasoning prevailed. This was a claim for services after bankruptcy. A claim for rent under similar circumstances will be refused.

D.

Petitioners' Authorities.

In pages fifteen *et seq.* of petitioner's brief reference is made to certain authorities. We concede that Moch vs. Market Street National Bank (107 F. 897)—Third Circuit; In re P. Semner Glass Co. (135 F. 77)—Second Circuit, are contra to our contention.

Colman vs. Withoft, 195 F. 250—(Ninth Circuit) is not, in our opinion, contra.

> "But the claim of appellant in this case, although it had its origin in the obligation of the bankrupt

to pay rent which accrued after the filing of the petition, is not, as it is presented, a claim for rent; but it is one that arises out of the contract of two lessees, jointly liable for rent, whereby one thereof, the bankrupt, agreed to reimburse the other for all the payments which it might make in excess of one-half of the rental, and to pay it one-half of such sum as it might be required to pay in gross, not to exceed $100 per month for the unexpired term, to obtain a rescission of the lease. Is such a claim provable against the estate?

"It is held by the decided weight of authority that subdivision 1 and 4 of section 63a of the Bankruptcy Act are in pari materia, and that the words 'absolutely owing at the time of the filing of the petition against him' are to be read into subdivision 4. In re Roth & Appel, 181 Fed. 667, 104 C. C. A. 649, 31 L. R. A. (N. S.) 270; In re Swift, 112 Fed. 315, 50 C. C. A. 264; In re Adams (D. C.) 130 Fed. 381; In re Burka (D. C.) 104 Fed. 326. It is apparent that the appellant's claim was not a debt due and owing at the time when the petition was filed, but that it was contingent; that is to say, all the facts necessary to be shown to establish the bankrupt's liability to the claimant had not occurred before the petition in bankruptcy was filed.

"'Where a liability of the bankrupt is not fixed, so that it can be liquidated by legal proceedings instituted at the time of bankruptcy, it is not a debt. It is deemed so far contingent that it cannot be proved in bankruuptcy, nor is it released by the bankrupt's discharge. A sum of money payable upon a contingency is not provable because it does not become a debt until the contingency has happened.' Loveland on Bankruptcy (3d Ed.) 342.

"In Dunbar vs. Dunbar, 190 U. S. 340, 23 Sup. Ct. 757, 47 L. Ed. 1084, it was said:

"'We do not think that by the use of the lan-

guage in section 63a it was intended to permit proof of contingent debts or liabilities or demands, the valuation or estimation of which it was substantially impossible to prove.'

"At the time when the petition was filed, not only was the bankrupt not indebted to the appellant, but it could not then be known that he ever would be indebted to it, either for money to be paid for rent or for money to be paid for the rescission of the lease. As far as the rent was concerned, there were the contingencies that the lessee might cancel the lease, or that the trustee in bankruptcy might elect to pay the rent, or that the appellant might fail to pay more than its half thereof. As to the agreement looking to a rescission of the lease, there were the contingencies that the agreement, which was without consideration, might be revoked by either party thereto before it was acted upon, or that it might be impossible to secure rescission on the terms stipulated by the bankrupt."

The quotation on page 17 of petitioner's brief misconceives the situation. Judge Gilbert treats the paper as *made* by the bankrupt. Of course, it cites the Moch case and is obiter. The reasoning quoted above supports us.

Cobb vs. Overman, 109 Fed. 65, Fourth Circuit, is not in point. In that case the obligation, a bond to pay periodic installments during life of beneficiary was a fixed liability, absolutely owing, though not due.

Therefore, there are only two circuits opposed to our position.

Under Point D, Petitioner's Brief, page 21, it is stated that this court has three times written opinions indicative of a tendency to hold contra to our position. They seem to us inapplicable. Riggin vs. Magwire, 82 U. S. 549, was under the Act of 1841; Martin vs.

Cole, 104 U. S. 30, says a negotiable instrument evidences an express contract. We agree. It is nevertheless contingent.

Dunbar vs. Dunbar, 190 U. S. 340, cited for petitioners, we claim as an authority for our position. That was a suit for the enforcement of an agreement to pay alimony "during widowhood." It was held not discharged by bankruptcy. Justice Peckham said:

> "We do not think that by the use of the language in section 63a it was intended to permit proof of contingent debts or liabilities or demands the valuation or estimation of which it was substantially impossible to prove."

II.

PROVABILITY OF CLAIMS BASED ON BANKRUPTS' ENDORSEMENT OF NEGOTIABLE INSTRUMENTS MATURING MORE THAN ONE YEAR AFTER ADJUDICATION.

Under the first subdivision of our argument we have considered the provability of all the claims. In addition to what has been said, certain of the notes were not provable because they did not fall due for more than one year after adjudication. This maturity, alone, could possibly make them provable and, as proof was then barred by the statute of limitation they could not be enforced.

John B. Varney claim $3,000.00, due October 3, 1926.

Smith & Scott, 2 notes, $2,400.00 each, due October 3, 1926 and 1927, respectively.

Bankruptcy Act, Section 57-n, reads "Claims shall not be proved against a bankrupt estate, subsequent to

one year after the adjudication." See Loveland, Sec. 301, where he states this rule. Even the Smith case, 146 Fed. 923, at 926, strong against us as to provability, admits the endorsed paper must fall due within a year.

> "It is true that to wait for the happening of a contingency may result in some delay in the distribution of dividends but the period within which proof can be made is limited by statute to one year and the great bulk of trade paper is short time paper."

The Moch case limits the time to a year. That rule runs all through the cases. Remington, Bankruptcy, 3rd Ed. Sec. 777; Jas. Dunlap Carpet Co., 163 Fed. 541. In re Schechter, 39 Fed. (2) 18.

We therefore submit this additional reason for the non-provability of these notes.

III.

LACHES.

A.

General.

All of the claimants plead that there has been such laches on the part of the Trustee in not filing petition for re-examination and to expunge until July 25, 1927, that he is now barred from any favorable decision disallowing and expunging these claims.

In each petition the Trustee has set up the circumstance which led him to delay the filing of these petitions to re-examine and expunge. In all of these cases, briefly, the reason alleged is that in another claim in the same bankruptcies, the Referee and the District

Court ruled that the contingent liability of an endorser upon an instrument not due at the date of the filing of the petition in bankruptcy was a provable claim in bankruptcy. The Trustee took prompt appeals from the ruling of the Referee and the ruling of the District Court in these matters in the case of Elliott vs. First National Bank. It was not until May, 1927, that the Circuit Court of Appeals sustained the Trustee's position upon this rule of law, and that order did not become final until June 13, 1927. On July 25th, these petitions to re-examine and expunge, based on that opinion, were filed. The question is whether this delay on the part of the Trustee was such laches as now make it inequitable to permit a re-examination of these questions.

It will help in determining this point to briefly refer to the general rules as to what is or is not laches. This will be found discussed in Pomeroy 4th Ed., Sec. 1440, *et seq.* In Section 1442, Professor Pomeroy states an accurate and concise definition drawn from Chase vs. Chase, 20 R. I. 202, 37 Atl. 804:

> "Laches in legal significance is not mere delay, but delay that works a disadvantage to another. So long as the parties are in the same condition, it matters little whether one presses a right promptly or slowly, within the limits allowed by law, but when knowing his rights, he takes no step to enforce them until the condition of the other party has, in good faith, become so changed that he can not be restored to his former state if the right be then enforced, delay becomes inequitable and operates as estoppel against the assertion of the right. The disadvantage may come from loss of evidence, change of title, intervention of equities, or other cause, and when a court sees negligence on one side and injury therefrom on the other, it is a ground for denial of relief."

This statement is supported by a host of authorities there cited.

We do not contend that in the absence of a statute of limitation applicable to equity cases, that equity necessarily applies the legal statute of limitation. We do say that

> "Under ordinary circumstances, a suit in equity will not be stayed for laches before, but will be stayed after, the time fixed by an analogous statute of limitation at law, but if unusual conditions or extraordinary circumstances make it inequitable to allow the prosecution of the suit after the briefer, or to forbid its maintenance after a longer, period than that fixed by the statute, the chancellor will not be bound by the statute, but will determine the extraordinary case in accordance with the equities which condition it. * * * * When a suit is brought within the time fixed by an analogous statute, the burden is upon the defendant to show, either from the face of the bill, or by his answer, that extraordinary circumstances existed which required the application of the doctrine of laches; but when such a suit is brought after the statutory time has elapsed, the burden is on the complainant to show, by suitable averments in his bill, that it would be inequitable to apply it to his case." Pomeroy, Section 1441.

In the present case, as we will hereafter show, there is a statute of limitation which is applicable; that statute of limitation is not applicable to a legal cause of action, but is in the Bankruptcy Act itself, and the Trustee, in filing these petitions, is wholly within his rights, although the length of time mentioned above has elapsed since the filing of the claims in bankruptcy.

B.

Laches Regardless of Bankruptcy Law.

Taking up first, consideration of the case of the Trustee, regardless of the Bankruptcy Act, and considering it purely as an equitable question of laches, our contention is that there can be no laches, because of the time of filing the petitions for re-examination, because of the fact that there has been no change of position, and no disadvantage to the claimant from this delay. This is necessarily true when we consider that all the claimant has done is file his claim upon the note; that claim has been allowed; there is no contention that because of that allowance the claimant has been prejudiced.

Petitioners contend they were misled to their disadvantage in two particulars: (a) Because assuming that notes due within one year only are provable, and then only after steps under the Negotiable Instrument Law to fix liability, as explained in subdivision two, they cannot now make amended proof of their claims, as the year had expired, when reconsideration was sought. Petitioners' Brief, pages 27-30 and 31. The notes affected would be the following:

Ronan note, $3,000.00, due October 3, 1925.
One Smith & Scott note, $2,400.00, due October 3, 1925.
Rutherford note, $15,000.00, due September 25, 1925.

The rule barring claims after one year does not apply to amendments to existing claims, setting up new or additional grounds. Remington (Third Edition), Section 888, *et seq.* Therefore, if the court should hold

such claims provable, proper amendment may be made. (b) Because of failure to protest certain notes allegedly based on the allowance of the claims without exception.

Two of the notes, one Varney, one Smith and Scott, were not protested by the claimants. The Maynard note and the Smith and Scott note, both falling due October 3, 1925, and after the order allowing the claims against both estates on August 18, 1925, were both duly and regularly protested and notice given. These claimants did not rely on the order of allowance. They apparently understood the law better than counsel for the Trustee and protected their interest fully. Before the notes, which were not protested fell due, the referee had on January 26, 1926, and the District Judge had, on May 26, 1926, overruled the petition of the Trustee against the First National Bank, in these same proceedings, which claimed non-provability under Section 63-a, on the ground that the endorsements in that case were not obligations of the bankrupt, at the time of the filing of the petitions in bankruptcy. It would not be a violent presumption that this action of these two judges was as much the cause of the failure to protest the October 3, 1926, notes as the inaction of the Trustee. Particularly is this to be assumed when the same claimants and the same counsel protested the notes of October 3, and September 25, 1925, even though no proceedings to re-examine were then pending.

On October 3, 1926, it had never been held that the endorsement of a bankrupt on a note unmatured at bankruptcy was not provable, if it fell due within the year. It had been stated obiter by text writers and courts that such notes were non-provable, if they fell due after the year. Subdivision 2 hereof. Judge Cochran in his manuscript opinion in the First National case had refused allowance where there had been

no protest, even within the year, though he held the claims otherwise provable. Therefore, the failure to protest the 1926 notes would have required the expunction of the claims, under any conceivable holding as to provability, unless it is to be determined that every endorsement of a bankrupt, regardless of the time of maturity of the note upon which it is placed is to be regarded as a provable debt, protest or no protest, notice or no notice.

There was certainly no reason why protest should not have been made under Sections 81 and 113 of the Negotiable Instrument Law on determination of the Referee contra to petitioners. Those sections read—

SECTION 81. WHEN DELAY IN MAKING PRESENTMENT IS EXCUSED.

"Delay in making presentment for payment is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, presentment must be made with reasonable diligence."

SECTION 113. DELAY IN GIVING NOTICE—HOW EXCUSED.

"Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence."

Furthermore, it is a well-recognized rule that where a suit is pending concerning the same subject matter, but between other parties, it is not laches for the plain-

tiff in the case in which laches is pleaded, to await the outcome of that litigation before involving himself and the person pleading laches, in further legal controversy over a subject of dispute which will be finally determined in the already pending litigation. Mr. Pomeroy recognizes this rule in Section 1455. It was so held in U. S. Mittis Co. vs. Detroit Steel Spring Co., 122 Fed. 863, which case was cited with approval in Schey vs. Tury, Circuit Court of Appeals of Second Circuit, 294 Fed. 679. This rule was also announced in Jersey City vs. Central R. Co., 212 Fed. 76, and was further recognized in the case of a stockholder in a corporation who waited until a short time before litigation involving the same relief, but by other stockholders of the same corporation, was finally adjudicated, before filing suit, and it was held that the stockholder was entitled to await the result of that litigation before starting independent litigation upon his own part. Jackson Co. vs. Gardiner Investment Co., 200 Fed. 113.

The same rule prevails where litigants are defeated in one suit, for lack of jurisdiction, and bring another later on, in the proper court. Southern Pacific Co. vs. Bogart, 250 U. S. 483.

We, therefore, submit that there is no laches in this case, first, because there has been no change of position to the disadvantage of the claimant pleading laches; and, second, because the Trustee had a right to await the outcome of the litigation of the First National Bank before filing these further petitions to re-examine claims on an identical proposition of law. This latter contention is all the more true in a case of bankruptcy, because there all of the parties claimant were parties to that suit, and must be presumed to have known the contentions that were being made, and the litigation that was going on, which held up the distribution of

the property, and the sale of the assets, awaiting the determination of the courts in that litigation.

C.

Laches Under Bankruptcy Act.

And there are even more cogent reasons than the above for holding that there is no laches in this particular case. Section 57-k of the Bankruptcy Act provides as follows:

> "Claims which have been allowed may be reconsidered for cause and reallowed or rejected in whole or in part according to the equities of the case, before but not after the estate has been closed."

That this also applies to cases where a dividend has been paid is made clear by Section 57-l of the Bankruptcy Act, which reads as follows:

> "Whenever a claim shall have been reconsidered and rejected in whole or in part, upon which a dividend has been paid, the Trustee may recover from the creditor the amount of the dividend received upon the claim, if rejected in whole, or the proportional part thereof, if rejected only in part."

General Orders in Bankruptcy, No. 21, Sec. 6, also has some bearing upon the matter under consideration. It reads as follows:

> "When the trustee or any creditor shall desire the re-examination of any claim filed against the bankrupt's estate, he may apply by petition to the referee to whom the case is referred, for an order for such re-examination, and thereupon the referee

shall make an order fixing a time for hearing the petition, of which due notice shall be given by mail addressed to the creditor, etc."

It is our contention that these provisions of the Bankruptcy Act definitely fix the limits within which a petition for re-examination may be filed; that these are statutes applicable to suits in equity, and to these bankruptcy claims, and that, therefore, the Trustee was well within his rights in awaiting the determination of the other suits before beginning the five actions here in question upon similar issues of law.

Our conclusions are supported by the authorities. In In re Star Spring Bed Co., 265 Fed. 137, it was held that there was no laches in moving to expunge after four and one-half months.

In In re Globe Laundry Co., 198 Fed. 365, there was objection because of the delay of the trustee in moving to expunge. This was considered, and basing their conclusion on the sections of the Act above cited, the court held that it was perfectly proper for the Trustee to bring this suit. This case was cited in 254 Fed. 745, hereafter referred to.

When the point was made that the Trustee had been guilty of laches, it was held in the case of In re Canton Iron & Steel Co., 197 Fed. 767, that the "attack was in time, the estate not yet closed."

In re Huffman & Co., 15 Fed. (2) 345, it was held that a proceeding for reconsideration of a Referee's order was authorized at any time during the pendency of the estate.

As a final authority, we cite In re Caledonia Coal Company, 254 Fed. 742. In that case, a voluntary petition was filed in May, 1916. In July, 1917, the trustee filed a petition asking that certain claims be re-examined and expunged. Judge Tuttle said:

"It is further urged that the trustee has been guilty of such laches in filing his petition as to bar his right to do so. Delay alone does not constitute laches, the essential element being prejudice to another person, by reason of the delay complained of. It does not appear that the delay in this case has resulted in any injury or prejudice to the claimant which would now make it inequitable to allow the trustee to file his objections to these claims. Section 57-k of the Bankruptcy Act provides that 'claims which have been allowed may be reconsidered for cause and reallowed or rejected, in whole or in part, according to the equities of the case, before, but not after, the estate has been closed.'

"Under the circumstances, it can not be held that the trustee has been guilty of laches."

In the light of the statutory provisions of the Bankruptcy Act above quoted, and of the language of the authorities construing these provisions as to laches, we submit that the Trustee has not been guilty of laches within the definition of the authorities; that he has providently saved the litigants from the expense of determining questions which have been determined in this same proceeding adversely to them, and that he has kept not only within the strict letter of the statute as to the time when his petition to re-examine should be filed, but has kept within the spirit of those laws, in this method of handling his cases.

IV.

EFFECT OF FORMER PETITION TO RE-EXAMINE

A separate issue arises in the Rutherford claim. On August 18, 1925, the petitioner, A. G. Rutherford, filed

a claim against the estate of the bankrupt, Nancy Jane Varney, based on two notes, one for $38,000.00, signed by the bankrupt, and one for $15,000.00, the one here in issue, signed by a third party and endorsed by the bankrupt, Nancy Jane Varney, Record, p. 21. A petition for re-examination was thereafter filed by the Trustee directed solely against the $38,000.00 note. The petition was sustained and the claim, so far as it was predicated on the $38,000.00 note expunged. A petition for review of the Referee's order was allowed to the District Court, where the Referee's order was affirmed and, on appeal to the Sixth Circuit, the judgment of the District Court was affirmed.

No dividend has been paid on the note in question from the estate of this bankrupt.

On July 25, 1927, and after the determination on the former petition to re-examine and expunge, a petition to re-examine and expunge the claim on the $15,000.00 note was filed. This is the petition now in issue.

Apparently this is an issue of first impression. We can not cite an applicable decision. The propriety of our action is based upon the following reasoning:

The appellee, Rutherford, filed an answer, B, Record, p. 24, setting up the facts above stated and claiming that it would be inequitable to now permit a re-examination of that part of the claim based on the $15,000.00 now in question. It is apparently a plea of *res adjudicata*. It is to be observed that the record says nothing, either in the statement of the grounds of the petition or in the answer, as to the issues in the former petition for the re-examination of the claim based on the $38,000.00 note. There is therefore nothing to show that the question here in issue was decided in the former litigation. This is a burden which rested on the appellee. The record in fact shows that the same issue

could not have been adjudicated. The $38,000.00 note was signed by the bankrupt, Record, p. 21. This $15,000.00 note was endorsed by her. The issue is as to the provability of the endorsement of an unmatured note. Therefore, this issue could not have been in question on the former petition.

A re-examination is allowed under Clause Six of General Order 21 and k of Bankruptcy Act 57, both of which are quoted in the Brief of Argument, pages 8 and 9. The procedure is governed by General Order 21. It will be noted that the proper procedure is by petition for re-examination. This is the first step. That petition, by familiar principles must state the grounds of the Trustee's cause of action against the claimant. In this proceeding a valid ground for expunction of the $38,000.00 claim was stated, which resulted in its being expunged. Was the former proceeding an adjudication of the present issue which bars this proceeding?

The decree in the former proceeding was upon a cause of action which stated the invalidity of the claim of $38,000.00 upon a note signed by the bankrupt. The decree sought in this proceeding is upon the validity or invalidity of an entirely separate note endorsed by the bankrupt for $15,000.00. Not only is the cause of action distinct but the grounds for the decree will be based on an utterly different issue. This renders the plea of *res adjudicata* ineffectual.

> "The effect of a judgment or decree as *res adjudicata* depends upon whether the second action or suit is upon the same or a different cause of action. If upon the same cause of action, the judgment or decree upon the merits in the first case is an absolute bar. * * * * But if the second case be upon a different cause of action, the prior judg-

ment or decree operates as an estoppel only as to matters actually in issue or points controverted, upon the determination of which the judgment or decree was rendered." Baltimore S. S. Co. vs. Phillips, 274 U. S. 316.

In Cromwell vs. County of Sac, 94 U. S. 351, it was early held that a suit on bonds and coupons was not *res adjudicata* on matters not actually litigated in the former suit, by reason of a decree determining fraud in the issuance of the bonds.

In Adams vs. Adams, 25 Minn. 72, there was a suit to recover on one of a series of notes. The defendant pleaded illegality of consideration. The plaintiff replied with a plea of *res adjudicata* on a default judgment on a former note of the series. Held that as consideration need not be alleged, it was not determined by the former suit and there was no estoppel.

In Independent Harvester Co. vs. Tinsman, 253 Fed. 935, the Harvester Company brought a bill to cancel a series of notes for fraud. A judgment was obtained by defendant in a different court on one. The fraud was not pleaded as a defense in this proceeding. The court held that fraud was not *res adjudicata* in the cancellation suit because it was a different cause of action.

In Jacobson vs. Miller, 41 Mich. 90, an opinion by Judge Cooley, it was held that a former suit for an installment of rent, determined in plaintiff's favor, did not support a plea of *res judicata* to a defense of *non est factum*, where this defense was not made in the former suit, because the present suit was on a different cause of action.

In this estate a claimant filed his deposition to establish his right to a part of the funds administered upon two notes. This gave rise to two distinct causes of action in the Trustee, one flowing from each note. Each

cause of action was the primary right in the trustee to question the validity of each note as a claim against the estate. It was no more necessary for him to file a petition to expunge both notes at the same time than it was for him to file, at one time, and in the same petition, exceptions to all claims filed in the estate. We therefore submit that the plea of *res judicata* is unavailing against this petition for re-examination of the Rutherford claim.

For the foregoing reasons it is respectfully submitted that the judgment of the Circuit Court of Appeals for the Sixth Circuit should be affirmed in each case.

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SUPREME COURT OF THE UNITED STATES.

Nos. 239, 240, 241 and 242.—October Term, 1930.

Alvis Maynard, Administrator of Mary A. Ronan, Deceased, Petitioner,
239 *vs.*
W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney.

John B. Varney, Petitioner,
240 *vs.*
W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney.

J. M. Smith and A. B. Scott, Petitioners,
241 *vs.*
W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney.

A. G. Rutherford, Petitioner,
242 *vs.*
W. K. Elliott, Trustee in Bankruptcy of Nancy Jane Varney and Pricy A. Varney.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit.

[April 13, 1931.]

Mr. Justice Stone delivered the opinion of the Court.

The bankrupts in these cases were endorsers of promissory notes payable to petitioners, some of them within the year after adjudication, allowed by § 57 (n) of the Bankruptcy Act (July 1, 1898, c. 541, 30 Stat. 544, 561) for proof of claims, others at later dates. Petitioners filed proofs of claim upon the endorsements, which were allowed. Proceedings were brought by the trustee to expunge the claims as not provable.

Upon review, the Circuit Court of Appeals for the Sixth Circuit held that as none of the notes was due at the time of the petition, and as neither presentment nor notice of dishonor had been waived, the liability with respect to each of the endorsements was not a provable claim because contingent, and gave judgment accordingly, 40 F. (2d) 17, following its earlier decision in *First National Bank* v. *Elliott*, 19 F. (2d) 426. This Court granted certiorari, 282 U. S. —, October 13, 1930, to resolve the conflict between the decision below and those of other circuit courts of appeals, in *Moch* v. *Market Street National Bank*, 107 Fed. 897 (C. C. A. 3rd), and in *In re Semmer Glass Co.*, 135 Fed. 77 (C. C. A. 2d), appeal dismissed, 203 U. S. 141; see *Colman Co.* v. *Withoft*, 195 Fed. 250, 253.

Section 63 of the Bankruptcy Act provides:

"(a) Debts of the bankrupt may be proved and allowed against his estate which are (1) a fixed liability, as evidenced by a judgment or an instrument in writing, absolutely owing at the time of the filing of the petition against him, whether then payable or not, with any interest thereon which would have been recoverable at that date or with a rebate of interest upon such as were not then payable and did not bear interest; . . . (4) founded upon an open account, or upon a contract express or implied; . . .

"(b) Unliquidated claims against the bankrupt may, pursuant to application to the court, be liquidated in such manner as it shall direct, and may thereafter be proved and allowed against his estate."

Section 17 provides that "A discharge in bankruptcy shall release a bankrupt from all of his provable debts . . . ." with exceptions not now material, and § 1 (11) that "'debt' shall include any debt, demand, or claim provable in bankruptcy". Earlier acts provided for the proof of various types of contingent liability specifically enumerated, including that of the endorser of negotiable paper, § 5, Act of August 19, 1841, c. 9, 5 Stat. 440, 445; § 19, Act of March 2, 1867, c. 176, 14 Stat. 517, 525.

Although the omission of any reference to contingent claims in § 63 of the present Act has led to some confusion and uncertainty in the decisions, it is now settled that claims founded upon contract, which at the time of the bankruptcy are fixed in amount or susceptible of liquidation, may be proved under subdivision (a) (4) of that section, although not absolutely owing when the peti-

tion is filed. *Williams* v. *U. S. Fidelity Co.*, 236 U. S. 549; *Central Trust Co.* v. *Chicago Auditorium*, 240 U. S. 581. The sole question now presented is whether the liability of an endorser is of that class.

The obligation of an endorser is at least a "claim", and hence a debt so far as defined by § 1 (11); and the language of § 63, which permits proof of a claim "founded . . . upon a contract, express or implied", is broad enough to embrace the liability of an endorser upon negotiable paper which has not matured at the time of the adjudication. Within three years after the enactment of the Bankruptcy Act, the Court of Appeals for the Third Circuit, in *Moch* v. *Market Street National Bank, supra*, held that the liability of a bankrupt endorser of commercial paper, which did not mature until after the filing of the petition, was a provable claim under § 63 (a) (4). This ruling was followed by the Court of Appeals for the Second Circuit in *In re Semmer Glass Co., supra*, and appears to have been accepted by the Court of Appeals for the Ninth Circuit, *Colman Co.* v. *Withoft, supra*, p. 253, and by the district courts generally. *In re O'Donnell*, 131 Fed. 150; *In re Rothenberg*, 140 Fed. 798; *In re Smith*, 146 Fed. 923; *In re Dunlap Carpet Co.*, 163 Fed. 541; *In re Caloris Mfg. Co.*, 179 Fed. 722; *In re Buzzini*, 183 Fed. 827; *In re Refining Co.*, 192 Fed. 445; *In re Keith-Gara Co.*, 203 Fed. 585; *Heyman* v. *Third National Bank*, 216 Fed. 685; *In re Amdur Shoe Co.*, 13 F. (2d) 147. See also *Germania Savings Bank* v. *Loeb*, 188 Fed. 285, 289; *Courtney* v. *Trust Co.*, 219 Fed. 57, 66 (both C. C. A. 6th).

The rule thus announced seems not to have been seriously challenged until the decision, twenty-six years later, of the Court of Appeals for the Sixth Circuit in *First National Bank* v. *Elliott, supra*. In *Dunbar* v. *Dunbar*, 190 U. S. 340, the *Moch* case was cited and distinguished from the claim involved in that case, which was dependent upon a contingency so uncertain, as the court held, that its liquidation or valuation was impossible. In the meantime, leading text writers have stated that the liability of an endorser, upon a note falling due after the petition, is provable under § 63 (a) (4). 1 Loveland on Bankruptcy (4th ed.) p. 609; 2 Collier on Bankruptcy (13th ed.) pp. 1399-1400; 2 Remington on Bankruptcy (3rd ed.) § 777.

Only compelling language in the statute itself would warrant the rejection of a construction so long and so generally ac-

cepted, especially where overturning the established practice would have such far reaching consequences as in the present instance. But such language is wanting in § 63. That section purports to be an enumeration of classes of provable claims—not an enumeration of characteristics which must inhere in every claim proved. Only by reading into subdivision (a) (4) the limitation of subdivision (a) (1) that the claim must be absolutely owing, would there be ground for rejecting a claim against a bankrupt endorser as not complying with the former.

Respondent argues that (a) (4) must be so read, since, otherwise, the limitation in (a) (1) would be practically without effect. See *In re Roth & Appel*, 181 Fed. 667; *In re Hutchcraft*, 247 Fed. 187. But this contention was rejected by the decision in *Williams* v. *U. S. Fidelity Co., supra;* see *Central Trust Co.* v. *Chicago Auditorium, supra*, pp. 592, 593, and is not supported, as respondent contends, by *Zavelo* v. *Reeves*, 227 U. S. 625. That case held only that § 63, read in the light of the spirit and purpose of the Act, did not authorize proof of claim upon an obligation entered into by the bankrupt after the filing of the petition. See *In re Burka*, 104 Fed. 326.

Possible doubts as to the meaning of the section should be resolved in the light of the purpose of the Act "to convert the assets of the bankrupt into cash for distribution among creditors and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities consequent upon business misfortunes." *Williams* v. *U. S. Fidelity Co., supra*, p. 554; *Central Trust Co.* v. *Chicago Auditorium, supra*, p. 591. If this purpose be given its appropriate weight, a meaning cannot be attributed to the plain words of subdivision (a) (4), which would so restrict them as to preclude proof of claim upon the liability of an endorser of commercial paper, and result in its survival of the bankrupt's discharge as an obligation enforcible against him.

That some contingent claims are deemed not provable does not militate against this conclusion. The contingency of the bankrupt's obligation may be such as to render any claim upon it incapable of proof. It may be one beyond the control of the creditor, and dependent upon an event so fortuitous as to make it uncertain whether liability will ever attach. *In re Merrill & Baker,*

186 Fed. 312. Such a claim could not be proved under the Act of 1841 although in terms permitting proof of contingent claims. *Riggin* v. *Magwire,* 15 Wall. 549. Or, the contingency may be such as to make any valuation of the claim impossible, even though liability has attached. Of this latter class was the claim upon the bankrupt's contract to pay his divorced wife a specified amount annually so long as she should remain unmarried, proof of which was for that reason rejected in *Dunbar* v. *Dunbar, supra;* see *Atkins* v. *Wilcox,* 105 Fed. 595.

But the liability of an endorser is of neither class. Its amount is certain; and the contingency of notice of dishonor to the endorser is within the control of the creditor, so as to place his claim, so far as its certainty of accrual and its susceptibility of liquidation are concerned, upon the same footing as the contract of indemnity which was held provable in *Williams* v. *U. S. Fidelity Co., supra,* although the claimant had done nothing at the time of the bankruptcy to satisfy the liability for which the indemnity was given. See also *Central Trust Co.* v. *Chicago Auditorium, supra,* pp. 593, 594.

The claim against the endorser of paper not matured at the time of the bankruptcy thus stands on the same plane as contracts of suretyship or guarantee of payment of a debt not due until after the bankruptcy. See *In re Refining Co., supra;* Collier on Bankruptcy, *supra;* Remington on Bankruptcy, *supra.* Even though not due until after the year allowed for proof of claims, if proved in time, such a claim may be liquidated as are other unmatured claims. *In re Buzzini, supra,* p. 830. As the claim is provable, and as notice of dishonor after the petition is filed is necessary only to charge the endorser, in the event he does not secure his discharge, the claimant need not give notice of dishonor in order to share in the estate. See *Colman Co.* v. *Withoft, supra,* p. 253.

The application of respondent to expunge the claims should be denied in each case. The judgment will be reversed and the cause remanded for further proceedings in accordance with this opinion.

Reversed.

A true copy.

Test:

Clerk, Supreme Court, U. S.